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IN THE

Supreme Court of the United States

October Term, 1969.

No. 578.

ANTONIO CORALLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF FACTS	3
A. The Underlying Transaction	3
B. The Indictment	5
C. Herbert Itkin: The Record as to His Role as Informer	6
D. Procedural Handling of Itkin's Informer Status	10
E. Instructions Defining Bribery and Extortion	12
F. Instructions Concerning Accomplice Testimony	14
REASONS FOR GRANTING THE WRIT	16
1. Whether an Undercover Government Agent, Instructed by the FBI to Infiltrate an Alleged Criminal Activity, Can Be Treated in a Subsequent Criminal Conspiracy Prosecution as a Co-Conspirator for Purposes of Admission of Extra-Judicial Statements by Him or to Him	16
2. Whether the Procedure for Confirming That an Avowed Undercover Government Agent Is Such an Officer Should Require Timely Disclosure by the Government to Those Concerned, or, in Cases of Doubt, a Special Finding of Fact by the Court of Submission to the Jury or Both	18
3. Whether, Since There Was Substantial Evidence That a Public Officer Had Approached Prospective Contractors With a View to Obtaining a Kick-Back, the Trial Judge Committed Reversible Error by Failing to Instruct the Jury That Extortion, Under New York Law, May Be Committed "Under Color of Official Right"	24

INDEX (Continued).

Page

4. Whether, Where State Law Demands Corroboration of Accomplice Testimony in Order to Sustain a Conviction, It Was Prejudicial Error Not to So Charge the Jury in a Federal Prosecution Based Upon "Unlawful Activity" as Defined in State Law 27

CONCLUSION 29

APPENDIX A—Opinion of the Court of Appeals 1a

APPENDIX B—Opinion of the District Court Dated March 13, 1968 ..... 57a

APPENDIX C—Order of Court of Appeals Denying Petition for Rehearing 70a

APPENDIX D—Judgment of Court of Appeals 71a

APPENDIX E—Petition for Removal 72a

APPENDIX F—Statutes Involved 78a

TABLE OF CITATIONS.

Cases: Page

Aguilar v. Texas, 378 U. S. 108 (1964) 16
Beck v. Ohio, 379 U. S. 89 (1964) 17
Draper v. United States, 358 U. S. 307 (1959) 17
Grunewald v. United States, 353 U. S. 391 (1957) 21
Hoffa v. United States, 385 U. S. 293 (1966) 17
Jones v. United States, 362 U. S. 257 (1960) 16
Krulewitch v. United States, 336 U. S. 440 (1949) 21
Lewis v. United States, 385 U. S. 206 (1966) 17
Leyra v. Denno, 347 U. S. 556 (1954) 17
Lopez v. United States, 373 U. S. 427 (1963) 17
Mann v. Peoples First Nat'l. Bank & Trust Co., 209 F. 2d 570 (4th Cir. 1954) 8
Massiah v. United States, 377 U. S. 201 (1964) 17
McCray v. Illinois, 386 U. S. 300 (1967) 16
Nardello v. United States, 393 U. S. 286 (1969) 24, 26
On Lee v. United States, 343 U. S. 747 (1952) 17
Osborn v. United States, 385 U. S. 323 (1966) 17
People v. Dioguardi, 8 N. Y. 2d 260, 203 N. Y. S. 2d 870, 168 N. E. 2d 683 (1960) 25
People v. Feld, 262 App. Div. 909, 28 N. Y. S. 2d 796 (2d Dep't 1941) 25
People v. Josie, 134 N. Y. S. 2d 183 (Bronx County 1954) .. 26
People v. Negrin, 24 Misc. 2d 181, 201 N. Y. S. 2d 59 (1960) 27
People v. O'Farrell, 175 N. Y. 323, 67 N. E. 588 (1903) 27
Recznik v. City of Lorain, 393 U. S. 166 (1968) 17
Roviaro v. United States, 353 U. S. 53 (1957) 16
Spinelli v. United States, 393 U. S. 410 (1969) 16
United States v. Chase, 372 F. 2d 453 (4th Cir. 1967) 17
United States v. Wray, 8 F. 2d 429 (D. C. Ga. 1952) 18
Zahn v. Transamerica Corp., 162 F. 2d 36 (3d Cir. 1947) 8

TABLE OF CITATIONS (Continued).

Periodicals: Page

Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959) 18

Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs*, 60 Yale L. J. 109 (1951) 22

Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 Supreme Court Review 133 22

Note, 13 U. of Miami L. Rev. 380 (1959) 18

Note, 33 Tul. L. Rev. 393 (1959) 18

Authority:

9 Wigmore, Evidence § 2579 (3d ed. 1940) 8

New York Statutes:

Code of Criminal Procedure § 399 27

1909 Penal Law:

§ 372 2

§ 378 2

§ 850 ..... 2, 5, 25

§ 855 ..... 2, 5

§ 1826 ..... 2, 5

Federal Statutes:

Travel Act, 18 U. S. C. § 1952 ..... 2, 3, 5, 24, 26

28 U. S. C. § 1254(1) 1

28 U. S. C. § 1442(a)(1) 8

18 U. S. C. § 371 5

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Antonio Corallo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 8, 1969.

OPINIONS BELOW.

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra* (pp. 1a-56a), is not yet reported. The opinion of the District Court of the Southern District of New York reported in 281 F. Supp. 24 is printed herein as Appendix B (pp. 57a-69a).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 8, 1969. Appendix D (p. 71a). A timely petition for rehearing was denied on August 21, 1969 (Appendix C, p. 70a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether an undercover Government agent, instructed by the FBI to infiltrate an alleged criminal activity, can be treated in a subsequent criminal conspiracy prosecution as a co-conspirator for purposes of admission into evidence of extra-judicial statements by him or to him.

2. Whether the procedure for confirming that an avowed undercover agent is such an officer should require timely disclosure by the Government to those concerned or, in cases of doubt, a special finding of fact by the court or submission to the jury or both.

3. Whether, since there was substantial evidence that a public official had approached prospective contractors with a view to obtaining a kick-back, the trial judge committed reversible error by failing to instruct the jury that extortion, under New York law, may be committed "under color of official right."

4. Whether, where State law demands corroboration of accomplice testimony in order to sustain a conviction, it was prejudicial error not to so charge the jury in a Federal prosecution under the Travel Act based upon "unlawful activity" as defined in State law.

STATUTES INVOLVED.

The Federal statutory provision involved, 18 U. S. C. § 1952, is set forth in Appendix F, *infra*, pp. 78a-79a. The relevant provisions of the 1909 New York Penal Law, §§ 372, 378, 850, 855, and 1826, together with § 399 of the New York Code of Criminal Procedure, are set forth in Appendix F, *infra*, pp. 79a-81a.

STATEMENT OF FACTS.

Petitioner, Antonio Corallo, was convicted of conspiracy to violate the Travel Act, 18 U. S. C. § 1952. The one-count indictment charged petitioner along with Henry Fried, Herbert Itkin, James L. Marcus, Daniel J. Motto, Charles J. Rappaport, and S. T. Grand, Inc. Trial by jury was held in the United States District Court for the Southern District of New York. James L. Marcus was severed in advance of trial and pleaded guilty. Herbert Itkin was severed on the day trial began, June 3, 1968. Itkin has not been tried. The principal witnesses for the prosecution were Itkin and Marcus. Rappaport was acquitted by jury verdict. Petitioner, along with Fried, Motto, and S. T. Grand, Inc., was convicted.

The United States Court of Appeals for the Second Circuit (Medina, Waterman, and Kaufman, JJ.) affirmed on appeal.

A. The Underlying Transaction.

James L. Marcus was Commissioner of the New York City Department of Water Supply, Gas & Electricity in 1966. As Commissioner, it became his responsibility to enter into a contract for the draining and cleaning of a reservoir in the Bronx, known as the Jerome Park Reservoir. Because of the nature of the work, no competitive bidding was required. The Commissioner had the authority to select a contractor and negotiate an "emergency contract" with him. Marcus saw in this situation an opportunity to recover from a series of disastrous stock investments. The contract was eventually awarded to the S. T. Grand Company, of which Henry Fried was president. Grand, through Fried, agreed to kick back five percent of the contract price. That kick-back is the transaction underlying this prosecution.

Commissioner Marcus testified at length to the desperate financial situation in which he found himself from purchasing on margin large amounts of stock that dropped sharply in price (201a-205a).[1] He had an urgent need for cash to maintain his investment. His co-venturer in this investment was Herbert Itkin, a lawyer and friend (201a). They borrowed money from several sources, including petitioner and Motto, to deposit in the stock account. By June 1966, they owed approximately $75,000.00 (210a). They decided to try to recoup by asking for a seven and one-half percent kick-back on the Jerome Park Reservoir job that was estimated to run about one million dollars (210a).

Petitioner and co-defendant Motto were implicated as being involved in the negotiations between Itkin and Marcus and the contractor, S. T. Grand, Inc. Henry Fried balked at the high kick-back he was asked for (346a). Eventually a deal was closed with Fried for a five percent kick-back (223a, 363a, 653a). Three of the five percent were to go to Marcus and Itkin; the remaining two to Motto and petitioner (226a, 236a, 496a, 503a, 646a, 647a).

Meanwhile, Commissioner Marcus was exploring alternate possibilities to get a larger amount from the Jerome Park Reservoir job. He found that another contractor, Oakhill Contracting Company, was willing to pay a kick-back of ten percent (233a, 371a-372a). Accordingly, Marcus directed the Water Department's Chief Engineer to draw up a contract awarding the job to Oakhill (152a, 231a, 373a). When Itkin learned of this, he became extremely agitated; he insisted that a firm deal had been made with S. T. Grand, Inc., and that it was too late to change course. Following this talk with Itkin, Marcus directed the Chief Engineer to change the contract papers and draw them instead with S. T. Grand, Inc. (154a, 233a, 656a-657a).

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1. References in this Petition are to the pages of the Appendices filed in the court below and with the Clerk of this Court.

The contract was signed on November 23, 1966 (154a-155a). During the time that work was done on the reservoir and shortly thereafter (from December 1966 through May 1967), S. T. Grand, Inc. made a series of payments which were divided among Marcus, Itkin, Motto and petitioner (238a-264a, 511a-528a).

B. The Indictment.

The indictment against petitioner and his co-defendants charges a conspiracy (18 U. S. C. § 371) to violate 18 U. S. C. § 1952, familiarly known as the Travel Act. Section 1952 makes it a Federal offense to travel in interstate commerce or use a facility of interstate commerce to carry on or promote certain unlawful activities proscribed by State law. The indictment relies upon a few telephone calls from New York to Greenwich, Connecticut, where defendant Motto lives, for the facility of interstate commerce that underlies elevating this State transaction into a Federal offense. The "unlawful activity" that is charged is "bribery in violation of Articles 34 and 170, Sections 372, 378 and 1826 of the Penal Law of the State of New York" (22a-23a). With the consent of counsel for prosecution and defense, section 1826 was eliminated from the case before it was submitted to the jury (1281a). Thus, the indictment as submitted charges only that the defendants used a facility of interstate commerce to commit bribery as defined by New York Penal Law.

Significantly, the indictment does not charge the defendants with the "unlawful activity" of extortion, as defined by sections 850 and 855 of the 1909 Penal Law of New York.

The statutory provisions from the New York Penal Law covering bribery, incorporated in the indictment, and extortion, not charged, are reproduced in Appendix F of this petition.

C. Herbert Itkin: The Record as to His Role as Informer.

Before and at the trial, the prosecution chose to create the appearance that Herbert Itkin was a co-conspirator. As previously indicated, Itkin was named as a defendant in the indictment. He was not severed until the day that the trial began. No explanation was offered for the severance. The severance was made upon motion by the Government. In presenting its case, the prosecution chose to call James L. Marcus to the stand before Herbert Itkin. Marcus's testimony is shot through with references to statements made out of court by Itkin, statements that were admitted into evidence on the theory that they were declarations of a co-conspirator in furtherance of the conspiracy. Following Marcus's testimony, the Government called Itkin to the stand and elicited testimony from him that tended only to show his apparent complicity in an unlawful scheme.

Cross-examination of Itkin produced a radically different image. Itkin testified that he was an undercover agent for the Federal Bureau of Investigation and had been so since 1962, four years prior to the events concerning the Jerome Park Reservoir (550a, 694a, 726a). The following testimony is explicit:

> "Q. You first began informing to the FBI in 1962; is that correct? A. Approximately, yes.
>
> "Q. When you first began to inform, did you tell the FBI it was your purpose to infiltrate organized crime? A. No, I was asked by the FBI to infiltrate organized crime as deep as I could.
>
> "Q. The FBI asked you to infiltrate organized crime? A. That's right.
>
> "Q. Was that your general objective throughout your associationship with the FBI from 1962 until the present? A. Yes, it was.

"Prior to the subject matter of this indictment, did the FBI ever tell you to try and meet a specific person or try to go to a specific place and make contacts? A. They might have at times, yes.

"Q. They gave you instructions as to what to do on some occasions? A. Yes." (802a).

This testimony by Itkin, elicited by counsel for Rappaport, was repetitive of testimony brought out earlier by counsel for other defendants. Indeed, in the middle of the exchange quoted above, Government counsel objected on the ground that the same testimony had come forth "two minutes ago".

Itkin carried out his assignment from the FBI to infiltrate organized crime as deep as he could by posing as a participant in various illegal activities (552a-553a). While from time to time he received instructions from the FBI, "most of the time they left me on my own," he testified (727a). It is quite important to note that Itkin, testifying to acting "on his own", was merely describing the way in which he was left free to devise his own methods for accomplishing the task his FBI mentors had assigned to him.

Itkin vehemently denied that he was guilty of any criminal conduct, in the Jerome Park Reservoir contract kick-back and his other activities. ". . . I did not think I was guilty of a crime because I was working for the Government." (561a). Accordingly, he took it for granted that he would not be prosecuted (753a, 759a), and assumed that he had been named in the indictment only to protect his informer status (772a, 777a). The Government, of course, did move to sever Itkin as a defendant on the day the trial began, and Itkin has not been prosecuted.

Itkin has been prosecuted in State court for the events surrounding the kick-back on the Jerome Park Reservoir job. In the State proceeding, however, Itkin has filed a petition for removal to Federal court under 28 U. S. C.

§ 1442(a)(1). The petition asserts that Itkin was an "informer" for the FBI in these events and was acting under color of his office performing duties incidental to his mission of penetrating organized crime. A copy of this petition, which is still pending, is attached as Appendix E. The court below was furnished a copy of this petition. Judicial notice may be taken of this pleading, since it is a public document. *Mann v. Peoples First Nat'l. Bank & Trust Co.*, 209 F. 2d 570 (4th Cir. 1954); *Zahn v. Transamerica Corp.*, 162 F. 2d 36 (3d Cir. 1947); 9 WIGMORE, EVIDENCE § 2579 (3d ed. 1940).

At no point during the trial, in the face of Itkin's repeated declarations that he had been at all relevant times an undercover agent for the FBI, did the Government even suggest any different possibility. Government counsel maintained complete silence, allowing the testimony of their witness to stand without contradiction or qualification. Had this prime prosecution witness been misrepresenting himself to the court and the jury, surely Government counsel would have interceded to correct the record.

Before the Court of Appeals, Government counsel were more candid. The United States brief admits, albeit in a less than forthright statement, that Itkin had been "an FBI informant for years" (page 43).

In the face of this record, the Court of Appeals made two startling statements finding as a fact that Itkin had not been an undercover agent for the Government: ". . . Nothing in this record supports appellants' claim that [Itkin] participated in the conspiracy as a Government agent. . . . Itkin's participation in this conspiracy was wholly on his own. The record does not sustain appellants' claim that Itkin participated as a Government agent pretending to be a conspirator." Appendix A, *infra*, 31a). The Court of Appeals relies entirely upon one fragment of Itkin's ex-

tensive testimony. In answer to several artful questions from the trial judge, Itkin stated that he was engaged in the Jerome Park Reservoir transaction "on his own" (566a). As indicated earlier, however, Itkin made perfectly clear later what he meant by this phrase. It did not negate his role as undercover agent; it signified that he was acting without specific instructions in carrying out a general mandate to infiltrate organized crime. Thus, this testimony:

> "Q. Mr. Itkin, you devoted your life since 1962 to uncovering underworld elements, is that correct? A. The best that I could, yes.
>
> "Q. Was that your primary objective in life? A. From 1962 on, yes, sir.
>
> "Q. Have you been doing this by yourself? Has this been a one man operation? A. On my part?
>
> "Q. Yes. A. Or with the Bureau? No, I worked alone, if that is what you mean.
>
> "Q. Was the Bureau cooperating with you in this endeavor? A. Yes.
>
> "Q. Did they give you instructions? A. On and off. Most of the time they left me *on my own*.
>
> "Q. Did they tell you what to do on given occasions? A. Oh, yes.
>
> "Q. Did you do what they told you to do? A. Yes.
>
> "Q. Did you do things *on your own*? A. Yes, I did." (726a-727a) (Emphasis added.)

In light of Itkin's detailed testimony that he was an undercover agent for the FBI, that he was acting pursuant to their instructions to infiltrate organized crime, that he was personally guiltless in his activities in connection with the Jerome Park Reservoir contract kick-back, that he had been indicted merely to protect his "cover" and that he

would not be prosecuted, and in light of the allegations in the removal petition filed to stop the State proceedings, it is incredible for any court to state that nothing in the record supports petitioner's claim that Itkin participated in the conspiracy as a Government agent. Itkin's testimony does not stand alone. The Government, not Itkin, moved for his severance on the trial date. Government counsel allowed his trial testimony to stand wholly unrefuted. The Government, not Itkin, admitted in its court of appeals brief that Itkin had been an FBI informer since 1962. An appellate court finding of fact that Itkin's participation in this conspiracy was wholly on his own and not at all as a Government agent is nothing short of judicial "newspeak."

D. Procedural Handling of Itkin's Informer Status.

The question of Itkin's status as an undercover agent for the Government was never frontally resolved in the District Court. As indicated, the Government moved to sever Itkin from the defendants and agreed to dismiss the indictment against him. Thus, the actions of counsel for the Government underscore their acceptance of his repeated assertions that, as an undercover agent, he was guiltless.

Government counsel nevertheless chose to put on their case in chief under the appearance that Itkin was a guilty co-conspirator. Thus, they called to the stand their star witness, James L. Marcus, before Itkin. They extracted from Marcus testimony that is replete with extrajudicial statements to and by Itkin that are admissible only on the theory that Itkin was a member of the conspiracy. The charade was maintained even through the direct examination of Itkin himself.

When cross-examination of Itkin brought out his role as undercover agent, counsel for petitioner moved for a mistrial (596a). The motion was denied on the plainly un-

tenable ground that "a good deal of the evidence was developed by defendants' counsel themselves in cross-examination" (597a).

Later, counsel moved for a more limited remedy of striking testimony of Itkin in so far as he was testifying to conversations not in the presence of petitioner (811a). This motion was renewed and elaborated at the close of the evidence (882a-890a). Both times the motion was denied. On the second occasion, the court indicated that it believed the evidence to be clear beyond any question that Itkin had been on an "independent venture of his own" (910a).

The trial court charged the jury that Itkin had admitted his "individual participation" in the crime charged in the indictment, and that, also, "by his own statement, he has been a government informer since 1962." He went on to tell the jury that the law does not prohibit the use of informers, that the Government ". . . is frequently compelled to rely upon the testimony of accomplices . . . or informers, and that "The fact that Itkin is an informer, as well as the fact that he and Marcus are accomplices, . . . should be considered carefully by you as bearing upon the credibility of each" (1259a-1260a).

Counsel for petitioner duly excepted to the refusal of the trial court to give his requested instruction No. 7, that "One, like Itkin, who acts as a government agent and enters into a purported conspiracy in the secret role of an informant cannot be considered a co-conspirator" (1265a).

While the jury was not called upon to determine that Itkin was an undercover agent for the Government, the question of the guilt or innocence of Charles Rappaport was submitted. The entire thrust of Rappaport's defense was to associate himself with the undercover agent status of Itkin (1247a). Rappaport was an attorney, associated in practice with Itkin (199a, 479a). While Rappaport did not testify,

his counsel's extensive cross-examination of Itkin was designed to develop both Itkin's Government role and Rappaport's nexus with it. The cross-examination extends from page 1274 of the trial transcript to page 1368 (726a-787a). Two witnesses were called for the purpose of testifying to statements tending to show Rappaport and Itkin working together for the United States (1133a, 1140a). The jury returned a verdict of not guilty with respect to Rappaport (1288a).

E. Instructions Defining Bribery and Extortion.

The one-count indictment, as stated above, charged the defendants with a conspiracy to use a facility of interstate commerce to commit the unlawful activity of bribery, as defined by the 1909 New York Penal Law.

Co-defendant Henry Fried raised the defense that he had paid the money under duress. The district court instructed the jury that the distinction between bribery and extortion was a question of fact and, with reference to Fried's defense, that the jury could not find him guilty unless the money had been freely paid by him (1250a-1254a). The court defined extortion by quoting part of section 850 of the Penal Law, as follows:

> "Extortion is the obtaining of property from another, or obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear. . . ." (1239a)

The definition of extortion given to the jury omitted the last clause of the statutory provision. Section 850 provides that extortion can be committed by use of force or fear. It further provides that extortion can be committed

in the obtaining of property "under color of official right." The jury was never instructed that extortion can be committed when a public official obtains money or property "under color of official right."

On the evidence developed at the trial, a plausible case could be made—indeed, the most plausible case could be made—that Commissioner James L. Marcus had committed the offense of extortion by obtaining money under color of official right.

Counsel for petitioner duly excepted to the refusal of the district court to give requested instruction No. 21, as follows:

> "The defense of accepting a bribe and extortion or taking unlawful fees by public officers are different crimes. If you find from all the testimony in this case that there was an unlawful demand by public officers and the use of the facilities in interstate commerce to accomplish that state crime, you must find the defendant, Corallo, not guilty." (1266a)

The Court of Appeals discussed the failure of the trial judge to submit to the jury the question whether Marcus had extorted money from Fried and S. T. Grand, Inc. The Court of Appeals declared that there is no proof of such a scheme by Marcus. The court below went so far as to label the theory "fantastic." (Appendix A, *infra*, p. 38a).

The Court of Appeals ignored the substantial evidence that the essential nature of the transaction involved efforts by Commissioner Marcus to sell public contracts to the highest bidder in illegal kick-backs. Marcus's motive to recoup his heavy debts was known. He had an urgent need for cash to forestall liquidation of his stock holdings at a substantial loss. His office was then due to negotiate and let a large "emergency contract" without competitive bid-

ding. There is evidence tending to show that the Commissioner sought to turn this event to his own profit by demanding a kick-back from the contractors qualified and interested in the work. Through intermediaries, he demanded a full seven and one-half percent of the anticipated one million dollar contract price. The $75,000 he would thus obtain was enough to offset the losses he had suffered in his investment crisis. Indeed, this was how he fixed the amount he demanded. S. T. Grand, Inc., through Henry Fried, resisted this demand and the Commissioner's "fee" was lowered eventually to three percent. Later, after tentative agreement with Fried, the Commissioner found that he could get a larger sum from another firm, Oakhill Construction Co. At the last minute he was dissuaded from this course by Itkin who insisted that a firm deal had been made with S. T. Grand and that it was too late to change.

In short, there was substantial evidence from which a jury could have found that James L. Marcus used his official position to try to extract sums of money from contractors as a condition of their doing business with the City of New York. Unless they agreed to his demanded kick-back, they would be deprived of the valuable business opportunities that he controlled through the Department of Water Supply, Gas & Electricity. Acting thus under color of his office, Marcus could and did demand and obtain illegal payments. If the jury so found, the crime of extortion, not the charged offense of bribery, would be shown.

F. Instructions Concerning Accomplice Testimony.

The court charged the jury that the defendants could be convicted upon uncorroborated testimony of accomplices. The trial judge instructed:

"There is no requirement in the Federal Court that the testimony of an accomplice, an informer, or one with a criminal record be corroborated. A conviction may rest upon the uncorroborated testimony of such a witness if he is found credible and reliable." (1260a).

The trial court specifically refused a request by counsel for petitioner, No. 24, as follows:

"Under the laws of the State of New York, the offense of bribery cannot be proven on the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the testimony with the commission of a crime." (1266a).[2]

The theory of petitioner's request was to harmonize State and Federal law in prosecutions that are essentially based upon violations of State law, here the New York law of bribery. The Court of Appeals held that, even though New York law defined the offense, it was proper to use a Federal standard to determine whether accomplice testimony needs corroboration (Appendix A, *infra*, p. 37a).

2. This request for charge was based upon the uncertainty created by the Government as to Itkin's status. If Itkin was an undercover agent for the Government, as he testified, then he would not also have been an accomplice. The confusion on this was generated by the Government's pretense, and it survived through the submission of the case to the jury. The trial court referred to Itkin as both an accomplice and an informer (1260a). The issue raised by defendant's request for instructions No. 24 is premised on the view, left open to the jury, that Itkin was an accomplice, despite the evidence to the contrary.

REASONS FOR GRANTING THE WRIT.

1. Whether an Undercover Government Agent, Instructed by the FBI to Infiltrate an Alleged Criminal Activity, Can Be Treated in a Subsequent Criminal Conspiracy Prosecution as a Co-Conspirator for Purposes of Admission of Extra-Judicial Statements by Him or to Him.

The first question presented raises a fundamentally important issue concerning the use of undercover agents for the Government in criminal prosecutions. The question focuses on a Government witness who had been instructed to and who did infiltrate an alleged criminal activity. Subsequently, a conspiracy indictment was tried against members of that alleged criminal conspiracy. Can the Government's own undercover agent be treated as a culpable member of that conspiracy for the purpose of admitting into evidence extra-judicial statements by him or to him? This basic question has not yet been answered by this Court.

This Court has made other important decisions concerning undercover Government agents and informants. In *Roviaro v. United States*, 353 U. S. 53 (1957), the Court held that the prosecution must disclose to the defendant the identity of an undercover agent where the charge against the defendant, viewed in connection with the evidence actually introduced, is so closely related to the informer as to make his identity and testimony highly material. *Cf. McCray v. Illinois*, 386 U. S. 300 (1967). Similarly, the Court has developed standards for the sufficiency of undercover agent's information when utilized for the obtaining of a warrant. *Jones v. United States*, 362 U. S. 257 (1960); *Aguilar v. Texas*, 378 U. S. 108 (1964); *Spinelli v. United States*, 393 U. S. 410 (1969). So, too, when the undercover agent's information is used to justify an arrest and search

incident thereto. *Draper v. United States*, 358 U. S. 307 (1959); *Beck v. Ohio*, 379 U. S. 89 (1964); *Recznik v. City of Lorain*, 393 U. S. 166 (1968).

This Court has dealt with the problem of the invasion of privacy entailed when undercover Government agents insinuate themselves into the confidence of persons suspected of crime. *On Lee v. United States*, 343 U. S. 747 (1952); *Lopez v. United States*, 373 U. S. 427 (1963); *Lewis v. United States*, 385 U. S. 206 (1966); *Hoffa v. United States*, 385 U. S. 293 (1966); *Osborn v. United States*, 385 U. S. 323 (1966). The Court has faced and resolved issues arising when confessions are obtained by undercover Government agents. *Massiah v. United States*, 377 U. S. 201 (1964); *Leyra v. Denno*, 347 U. S. 556 (1954).

The Court has not yet dealt with the question posed here when an undercover Government agent continues to pretend to be a member of a criminal conspiracy through the introduction of the prosecution's case in chief. It should be obviously correct on principle that one who acts as a Government agent in the secret role of an informer cannot be a co-conspirator.

There is authority in the lower Federal courts and elsewhere for this proposition. The Fourth Circuit recently said in *United States v. Chase*, 372 F. 2d 453, 459 (4th Cir. 1967):

> "Although a conspiracy may continue even though certain co-conspirators terminate their connection therewith, and may be replaced by other co-conspirators, it cannot be said that this conspiracy continued after April 5, 1965 between Carr and Chase, because it is equally well-established that one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator. *Sears v. United States*, 343 F. 2d 139 (5 Cir. 1965)."

See also *United States v. Wray*, 8 F. 2d 429 (D. C. Ga. 1925); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 926 (1959); Note, 13 U. OF MIAMI L. REV. 380 (1959); Note, 33 TUL. L. REV. 393 (1959).

While the question has thus been raised and determined in other forums, this Court has not yet spoken to the important question. It is highly appropriate that the matter be resolved at the highest level. As the spate of recent cases indicates, the Government is making increased use of undercover agents to try to ferret out criminal conduct. The question presented is necessarily recurrent and its resolution is vital to the prosecution process.

Moreover, the issue goes to the very core of this case before the Court. The Government's failure to be candid and forthright with the trial court, the jury, and the actual defendants is an intolerable mode of prosecution, calling for this Court's firm and immediate guidance.

2. Whether the Procedure for Confirming That an Avowed Undercover Government Agent Is Such an Officer Should Require Timely Disclosure by the Government to Those Concerned, or, in Cases of Doubt, a Special Finding of Fact by the Court or Submission to the Jury or Both.

Overruling Herbert Itkin's unqualified testimony that he served as an undercover Government agent in infiltrating the conspiracy charged in this case, the Court of Appeals below engaged in an extensive fact-finding discussion that concluded with that court's finding that Itkin was not such an agent. We will return later to the substance of analysis of the Court of Appeals opinion. What is most significant is the procedure that left the appellate court in the position of making *de novo* such a fundamental finding of fact. Assuming that there can be any doubt on a question of fact of

this nature, the proper place for fact-finding is in the trial court, not the Court of Appeals.

The question presented here is what procedure should be employed in the trial court to deal with testimony like Itkin's testimony that he had infiltrated the negotiations for a kick-back on the Jerome Park Reservoir contract pursuant to instructions from the FBI. Confusion was generated by the Government's decision to include Itkin as a named defendant in the indictment, even though they moved without explanation to sever him on the date trial began. Confusion was compounded when the prosecution chose an order of proof that called James L. Marcus to the stand before Itkin and thus introduced major testimony concerning Itkin's out of court statements and statements to Itkin not in the presence of all defendants. This compounded confusion was aggravated when the Government called Itkin to the stand as a prosecution witness and failed to elicit on direct examination anything concerning his undercover status, allowing that to come forth in the course of cross-examination by counsel for the various defendants.

When, belatedly, Itkin's avowed status as an undercover Government agent came out, the Government did nothing either in re-direct examination or by other witnesses or by any means to counter the testimony of the Government witness that he was a Government agent. The trial judge interjected two questions, obviously leading in character, that produced Itkin's affirmance that he had acted "on his own." In his charge to the jury, the trial judge referred to Itkin as both an accomplice and informer, without recognition that there might be an inconsistency there. The judge refused to charge the jury that one who acts as a Government agent and enters into a purported conspiracy in the secret role of an informant cannot be considered a co-conspirator. The court also refused to strike testimony

admitted under the impression that Itkin was a co-conspirator; likewise, he refused to give limiting instructions.

Through the Court of Appeals, petitioner maintained that the record was clear and uncontradicted that Itkin was an undercover Government agent. The only possible doubt stemmed from the trial court's two questions concerning Itkin acting on his own, but, as Itkin explained later, this meant only that he was acting without specific, detailed instructions. In Itkin's view, he was at all times carrying out his FBI mandate to infiltrate organized crime as deeply as he could.

The Court of Appeals has declared that nothing in the record supports a claim that Itkin participated as a Government undercover agent pretending to be a conspirator. The Court of Appeals quotes the two "leading" questions put by the trial court. The rest of the Court of Appeals' analysis deals with speculation and inference wholly inconsistent with the record.

First, the Court of Appeals notes that none of the defense counsel called as a witness the FBI agent, William Veriker, who had been Itkin's contact with the Bureau. The court goes so far as to cite a passing remark by counsel for petitioner during cross-examination of Itkin when the witness was reluctant, for the moment, to agree to having been very distraught in one meeting with Veriker; counsel said that he would call the agent, but the matter became sufficiently clear a few moments later in the cross-examination. The suggestion by the Court of Appeals that it was the burden of the defense to call agents of the FBI to confirm Itkin's testimony is baseless. Itkin's testimony was clear and persuasive. He testified as a Government witness. The Government severed him from the case.

The Court of Appeals prefaced its discussion of the critical issue of Itkin's status with the following remarkable observation:

> "The path of the prosecutor in a conspiracy case is full of snares and pitfalls. As the conspirators run for cover a favorite diversionary tactic is to spread confusion by pursuing digressions suggested by proof having only a tangential bearing on the case." (Appendix A, *infra,* p. 31a).

The implication that Itkin's status was a tangential issue is incredible. Further, the Court of Appeals' sympathy for the plight of the prosecutor is flatly inconsistent with the teaching of this Court and with common sense. This court declared in *Grunewald v. United States,* 353 U. S. 391, 404 (1957):

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."

This Court cited particularly the famous opinion of Justice Jackson in *Krulewitch v. United States,* 336 U. S. 440, 454 (1949):

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather flock together. If he is silent, he is taken to admit it and if, as so often happens, co-defendants can be prodded into accusing and contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

The prosecutors in this case ran afoul of snares and pitfalls of their own creation. It was not the defense that

spread the confusion, such as it is. The Government chose to keep concealed, until the last possible moment, Itkin's relationship with the FBI. Meanwhile, the record was saturated with inadmissible evidence. Further, the defendants were forced to stand trial jointly with Rappaport, whose main line of defense was to prove his own association with undercover agent Itkin in the FBI sponsored effort to infiltrate organized crime, supposedly represented by petitioner and the other defendants.

The Court of Appeals' theory that Itkin was not an FBI agent is marred by the jury verdict acquitting Rappaport. The court below was forced into the awkward position of speculating on reasons for the verdict that might be separate from Rappaport's main defense (Appendix A, *infra,* p. 33a).

The Court of Appeals also speculated freely on certain elements of Itkin's conduct. Itkin admittedly took some of the money distributed to the conspirators, and he delayed making a full report to the FBI on the transaction until it had been completed. Itkin testified on the witness stand as to his reasons for so doing. He was greatly concerned that there would be a leak in his "cover." He testified that he was afraid that premature reports to the FBI would lead to dissemination of the facts to other agencies and would reveal his undercover role too soon (555a, 795a). Itkin viewed himself as "the man in the field," who was taking risks involved in the gathering of information for the Government (556a). As such an operative, he felt that he should pick the time and place to come out from his undercover role (556a).[3]

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3. "Informers and secret agents . . . must be developed or placed over a long period of time and the objective of their 'search' will almost always be broad and impossible to delineate with any precision in advance." Kitch, *Katz v. United States: The Limits of the Fourth Amendment,* 1968 Supreme Court Review 133, 142. See also Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs,* 60 Yale L. J. 109 (1951).

The Court of Appeals' analysis, in short, consists of a general axiom concerning the plight of prosecutors and the deviousness of defendants in conspiracy cases, a chance remark by defense counsel cited out of context, attenuated inferences from certain ambiguous but explained aspects of Itkin's conduct, and free-ranging speculations on possible bases of the jury's verdict other than that most obvious. At no point does the Court of Appeals deal directly with the extensive, explicit testimony of the avowed undercover agent except for the two questions put by the trial court.

Such a process of dealing with the vital question of the status of a Government witness, who professes to be an undercover agent for the Government, is plainly untenable. Petitioner still maintains that the record in this case is clear and explicit that Itkin was at all relevant times an undercover agent for the FBI. That position is urged, not as a matter of law, as suggested by the Court of Appeals. It is urged as a matter of fact, the only plausible reading of the record in the case. The record facts are supplemented by the Government's belated admission in the Court of Appeals that Itkin had been an FBI informer since 1962. It is further supplemented by the events that have transpired in connection with a State prosecution against Itkin who has successfully sought shelter by a petition for removal of the case to Federal court based upon his duty as a Federal officer.

Should the record be deemed in doubt on the issue of fact, the correct procedure would not place the task of factual evaluation, inference drawing, and credibility weighing in an appellate court. First and foremost, a standard must be developed for the obligation of the Government to avoid the confusion they created in this case by a full and timely disclosure of the Government's position concerning an avowed undercover agent. Government silence in such a situation must be taken as acquiescence.

In cases of genuine factual doubt, the issue should be sharply defined and cleanly resolved in the trial court. Very possibly, a *voir dire* hearing should be held in the manner prescribed by this Court for the determination by the court of the voluntariness of a contested confession. *Jackson v. Denno,* 378 U. S. 368 (1964). As with confessions, if the court finds that the confession is admissible, a factual issue can be tried to the jury.

The procedure for determining the status of undercover Government agents is manifestly in need of this Court's supervisory jurisdiction. The importance of the question is obvious. The need for this Court's guidance is unquestioned.

3. Whether, Since There Was Substantial Evidence That a Public Officer Had Approached Prospective Contractors With a View to Obtaining a Kick-Back, the Trial Judge Committed Reversible Error by Failing to Instruct the Jury That Extortion, Under New York Law, May Be Committed "Under Color of Official Right".

As this Court declared last Term in *Nardello v. United States,* 393 U. S. 286 (1969), the Travel Act, 18 U. S. C. § 1952, provides for a Federal overlay upon essentially State proscribed conduct. The Travel Act does not add to the totality of criminal behavior. It provides a means for certain Federal prosecutions in aid of enforcement of State criminal laws.

> "The Travel Act formed part of Attorney General Kennedy's legislative proposals to combat organized crime. . . . The Attorney General told the Senate Committee that the purpose of the Travel Act was to aid local law enforcement officials. In many instances the 'top men' of a given criminal operation resided in

one State but conducted their illegal activities in another; by creating a federal interest in limiting the interstate movement necessary to such operations, criminal conduct beyond the reach of local officials could be controlled. . . . The Attorney General's concerns were reflected in the Senate Committee Report favoring adoption of the Travel Act. The Report, after noting the Committee's belief that local law enforcement efforts would be enhanced by the Travel Act, quoted from the Attorney General's submission letter: 'Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.' " 393 U. S. at 290-291.

Extortion and bribery are mutually exclusive crimes, under the 1909 New York Penal Law. The indictment in this case, as it was sent to the jury, charged the defendants with a Federal conspiracy to commit the New York crime of bribery. There was no charge against the defendants derived from the New York offense of extortion. The trial judge charged the jury that they must acquit if the crime of extortion was made out. But the trial court incorrectly defined extortion. He crucially shortened the definition to omit the type of extortion committed "under color of official right." New York Penal Law § 850.

New York law, under the 1909 Penal Law, clearly separates bribery and extortion. These were held to be mutually exclusive offenses. See, *e.g., People v. Dioguardi,* 8 N. Y. 2d 260, 203 N. Y. S. 2d 870, 168 N. E. 2d 683 (1960); *People v. Feld,* 262 App. Div. 909, 28 N. Y. S. 2d 796 (2d

Dep't 1941); *cf. People v. Josie*, 134 N. Y. S. 2d 183 (Bronx County 1954). As defined by the courts of New York, the essence of bribery is the voluntary giving of something of value to influence performance of official duty. The essence of extortion is the involuntary payment or payment under duress.

This Court was faced in *United States v. Nardello, supra*, with an argument that would have narrowly construed extortion for purposes of the Travel Act to offenses so labelled in State criminal codes. The Travel Act, like New York law, clearly separates and differentiates bribery and extortion. The definition of "unlawful activity" in § 1952(b)(2) is: "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States." The distinction between the offenses of bribery and extortion found in the 1909 New York Penal Law is tracked in the Travel Act. Unlike the argument in *Nardello*, therefore, the contention here would not take the conduct outside the scope of the Travel Act. That Act covers both bribery and extortion. However, in this case, the indictment charges only the "unlawful activity" of bribery under the laws of the State of New York.

The question presented here, therefore, is an important development in working out the relationship between the Federal Travel Act and State "unlawful activity." The Court could usefully take up the limits of the principle enunciated in *Nardello* that Federal prosecutions are not strictly tied to the crime that happens to be called "extortion." It should not follow that the differentiation in State law and in the Travel Act between the broad crimes of extortion and bribery is without meaning.

4. Whether, Where State Law Demands Corroboration of Accomplice Testimony in Order to Sustain a Conviction, It Was Prejudicial Error Not to So Charge the Jury in a Federal Prosecution Based Upon "Unlawful Activity" as Defined in State Law.

Although petitioner was convicted of a Federal offense derivative from State law, the case, as submitted to the jury, would not sustain a conviction in the State courts. Under New York law, a defendant cannot be convicted of bribery upon the uncorroborated testimony of an accomplice or accomplices. The trial judge charged the jury in this Federal case that they could return a verdict of guilty even though the prosecution's case was based entirely upon accomplice testimony.

The relationship in the Travel Act between Federal and State law was developed in connection with the preceding question. The "unlawful activity" in this case was defined entirely by the law of New York. As a matter of New York law, bribery cannot be proved by accomplice testimony alone. N. Y. Code of Criminal Procedure § 399. The testimony of two or more accomplices is not sufficient to satisfy the requirement of corroboration; testimony of one is not corroborative of testimony of others. *E.g., People v O'Farrell,* 175 N. Y. 323, 67 N. E. 588 (1903); *People v. Negrin,* 24 Misc. 2d 181, 201 N. Y. S. 2d 59 (1960).

The Court of Appeals, rejecting this contention, held that: "The conduct of criminal trials in the Courts of the United States is governed by the Federal Rules of Criminal Procedure and by rulings of the federal courts in matters of procedure and practice not explicitly or by clear implication covered by these Rules. Federal law does not require corroboration of accomplice testimony to sustain a conviction. *Caminetti v. United States,* 242 U. S. 470, 495 (1917);

McCullough v. United States, 403 F. 2d 1013, 1015 (9th Cir. 1968); *United States v. Carrique*, 316 F. 2d 186, 187 (2d Cir. 1963); *United States v. Agueci*, 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963)." (Appendix A, *infra*, pp. 37a-38a).

None of the cases cited by the Court of Appeals is similar to the Travel Act in providing a Federal offense to aid in the enforcement of State criminal law. In each of the cited cases, the prosecution concerns an offense defined entirely by Federal law without reference to local crime. The Travel Act is a different kind of Federal offense, created not to enlarge the definition of criminal behavior, but rather to enable Federal prosecutions in situations where local law enforcement officials were hampered by defendants operating outside the State borders.

There is nothing in the Travel Act or any of its legislative history that suggests a purpose to enact a Federal law that permits prosecutors to escape the protections erected by State law to guard against improper convictions. New York's requirement of corroboration is not imposed as a purposeless obstacle to hinder prosecutors. Its obvious purpose is to insist on certain minimum standards of proof. The construction of the Travel Act by the Court of Appeals permits the use of a Federal law to overcome this protective measure of State law. The Travel Act was adopted to assist local law enforcement officials, to be sure. It was not designed to do so by enabling them to render nugatory the safeguards built into State law.

The question posed here is one that touches sensitive issues of Federal-State relations. Such questions patently warrant this Court's determination. The Court of Appeals relied upon an overly broad shibboleth that Federal trials are governed by Federal rules of procedure and practice. This Court should intervene to insure that the Travel Act

does not become a vehicle for riding roughshod over State law.

In the trial court representations were made that the Government had conducted no electronic surveillance of the petitioner except for that made by Itkin. Petitioner assumes that the Solicitor General will inform the Court if the above representations require any modification.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
Counsel for Petitioner.

Of Counsel:
BARRY I. SLOTNICK.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 331, 332, 333 & 334—September Term, 1968

(Argued January 17, 1969 Decided July 8, 1969.)

Docket Nos. 32686, 32687, 32688 & 32689

UNITED STATES OF AMERICA,

Appellee,

—against—

ANTONIO CORALLO, HENRY FRIED, DANIEL J. MOTTO and S. T. GRAND, INC.,

Defendants-Appellants.

Before:

MEDINA, WATERMAN and KAUFMAN,

Circuit Judges.

Appeals from judgments of conviction in the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge.*

Antonio Corallo, Henry Fried, Daniel J. Motto and S. T. Grand, Inc. appeal from judgments entered on a jury verdict, convicting appellants of violations of 18 U. S. C., Section 371. See also 18 U. S. C., Section 1952.

Affirmed.

DOUGLAS S. LIEBHAFSKY, Assistant United States Attorney, New York, N. Y. (Michael S. Fawer, Arthur A. Munisteri, Charles P. Sifton, Assistant United States Attorneys, and Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., on the brief), *for appellee.*

JACOB KOSSMAN, Philadelphia, Pennsylvania, *for defendant-appellant Antonio Corallo.*

ARTHUR KARGER, New York, N. Y. (Alfred Donati, Jr., and Zoloto, Karger & Zurkow, New York, N. Y., on the brief), *for defendants-appellants Henry Fried and S. T. Grand, Inc.*

JAMES M. LAROSA, New York, N. Y. (Herald Price Fahringer, Buffalo, New York, on the brief), *for defendant-appellant Daniel J. Motto.*

MEDINA, *Circuit Judge:*

Antonio Corallo, Henry Fried, Daniel J. Motto and S. T. Grand, Inc. appeal from judgments convicting them of conspiracy to use the telephone as an interestate facility with intent to violate the New York State bribery laws. The federal statutes involved are the general conspiracy law, 18 U. S. C., Section 371, and 18 U. S. C., Section 1952, which makes it a crime against the United States to use an interstate facility with intent to "promote, manage, establish carry on, or facilitate the promotion, manage-

ment, establishment, or carrying on, of any unlawful activity," including bribery in violation of state law. The indictment, handed down December 18, 1967, charged appellants together with James Marcus and Herbert Itkin and Charles Rappaport. Carl D'Angelo, Jr., is named as a co-conspirator but not as a defendant. Before the trial Marcus pleaded guilty and the case against Itkin was severed. After a jury trial presided over by Judge Edward Weinfeld, Rappaport was found not guilty and appellants were convicted. The principal, but not the only witnesses for the prosecution were Marcus and Itkin.

While the meetings, conversations and acts of the conspirators, and the various maneuverings, developments, sub-plots and backings and fillings are complicated and cover an extended period of time, the charge itself is a simple one. It is that Marcus, as Water Commissioner of the City of New York, had the sole discretionary power to award, without public bidding, on a cost-plus basis, a contract involving an estimated cost of $500,000 to $1,000,000, for the cleaning of the Jerome Park Reservoir in the Bronx; that appellants conspired with Marcus to arrange a kickback from Fried and S. T. Grand, Inc., Fried's company, if Marcus awarded the contract to Grand; and that the interstate use of the telephone was reasonably in the contemplation of the conspirators because of the nature of the negotiations and the necessity for caution and secrecy incident upon the collection of the kickback, as Motto, a principal negotiator, was a resident of Connecticut.

Appendix A

SYNOPSIS OF OPINION

PART I

THE CONSPIRACY AND APPELLANTS' PARTICIPATION IN IT.

PART II

ALLEGED ERRORS IN THE INSTRUCTIONS TO THE JURY AND IN REFUSALS TO CHARGE AS REQUESTED.

A

Proof of Events After the Award of the Contract to Fried on November 23, 1966 Was Relevant to the Crime Charged in the Indictment.

B

Whatever May Have Been Itkin's Contact With the FBI Nothing in This Record Supports Appellants' Claim That He Participated in the Conspiracy as a Government Agent.

1.

Itkin's Participation in This Conspiracy Was Wholly on His Own. The Record Does Not Sustain Appellants' Claim That Itkin Participated as a Government Agent Pretending to Be a Conspirator.

2.

The Request for Instructions on the Subject of Entrapment Was Properly Denied.

3.

The Trial Judge Properly Charged That in Prosecutions in Federal Courts for the Commission of Federal Crimes the Testimony of an Accomplice Requires No Corroboration to Sustain a Conviction.

C

THE REQUESTS TO CHARGE ON THE SUBJECT OF EXTORTION WERE PROPERLY DENIED.

PART III

AFTER CONSIDERING "ALL THE EVIDENCE IN THE CASE" THE JURY WAS WARRANTED IN FINDING THAT FRIED AND GRAND PARTICIPATED IN THE CONSPIRACY WITH REASONABLE ANTICIPATION THAT THE INTERSTATE TELEPHONE WOULD BE USED BY THE CONSPIRATORS OR SOME OF THEM TO EFFECT THE PURPOSES OF THE CONSPIRACY.

PART IV

THE CONDUCT OF THE TRIAL.

A

THE GRAND JURY TESTIMONY OF FRIED AND MOTTO WAS PROPERLY RECEIVED AND IT WAS NOT AN ABUSE OF DISCRETION TO DENY THE MOTIONS FOR A SEVERANCE.

B

WE FIND NOTHING IMPROPER OR PREJUDICIAL IN CERTAIN COMMENTS BY THE TRIAL JUDGE.

C

IN VIEW OF THE DIRECT EXAMINATION OF FRIED AND HIS TESTIMONY ON CROSS-EXAMINATION BY COUNSEL FOR OTHER APPELLANTS TO WHICH NO OBJECTION WAS RAISED ON FRIED'S BEHALF IT WAS PROPER FOR THE TRIAL JUDGE TO ASK FRIED WHETHER PRIOR TO THE TRIAL HE HAD INFORMED THE PROSECUTOR THAT PART OF HIS TESTIMONY BEFORE THE GRAND JURY WAS FALSE.

PART I

THE CONSPIRACY AND APPELLANTS' PARTICIPATION IN IT.

Even a superficial study of the record indicates a substantial basis for the findings of the jury that there was in fact such a conspiracy and that each of the appellants was a knowing participant in it. Fried testified and admitted that he told Itkin he had paid $40,000. There was proof of the extensive use of the telephone both to Motto at his Connecticut residence and from Motto in Greenwich, Connecticut, to various members of the conspiracy in New York City, corroborated in many instances by telephone toll slips produced by the Telephone Company. Moreover, the web of association between the appellants and Marcus and Itkin is clearly established. With this in mind, we turn to our chronological statement of the facts, based upon the view of the testimony and exhibits most favorable to the prosecution.

James Marcus began his career in city politics by serving as an assistant campaign manager to John Lindsay as Lindsay ran for election as Mayor of New York in the Summer and Fall of 1965. In June or early July, 1965,

Marcus was introduced to Herbert Itkin, a lawyer with connections in labor circles. He came to see Itkin frequently, until, after the election, he saw him practically every day. Itkin, in turn, introduced Marcus, in July, to Daniel Motto who was President of Local #350 of the Bakery & Confectionery Workers Union in Long Island City, and head of the Labor Non-Partisan League. Marcus hoped to gain an endorsement of Lindsay by Motto and by Motto's union supporters. With this end in view Marcus saw Motto several times during the campaign. After Lindsay's election in November of 1965, Marcus continued to see Motto and at one such meeting, in December of that year, when they went to a diner next door to Motto's Long Island City office for a cup of coffee, Motto introduced Marcus to Antonio Corallo, describing him simply as "my cousin Tony." In that same month, Itkin and Marcus, with several others, formed Conestoga Investments Ltd., to discover and promote the financing of investments in foreign countries.

In January of 1966, as the new administration took office, Marcus was given an office at the Municipal Building, in the Water Department. Marcus acted for a time as a liaison between the new administration and the Water Department, and, once he was sworn in as Assistant to the Mayor in March, 1966, he began to oversee the activities of the Department. In the course of this supervision, in March, he learned from Abraham Groopman, then Deputy Chief Engineer of the Department, that the Jerome Park Reservoir in the Northern Bronx was in bad shape. The previous fall, in November of 1965, heavy winds had roiled the reservoir and an accumulation of sludge that lay at the bottom of the basin had risen to the top and gone out into the water distribution system of the Bronx. There were many complaints of dirty water, odors and bad tastes.

Temporary measures were taken but, as the problem recurred, more drastic measures became necessary. The reservoir had not been cleaned since its opening in 1905 and its huge size—97 acres in surface and 750 million gallons of water in capacity—as well as the apparently huge amount of sludge presented difficulties beyond the resources of the Water Department to remedy.

An emergency contract was proposed by the engineers of the Department to Marcus. By this procedure a qualified contractor is selected by the Commissioner to perform the job. The contractor is paid his costs plus an allowance for overhead and a specified profit, subject, of course, to audit and revision by the Comptroller's office. The letting of the contract is within the sole discretion and is the sole decision of the Commissioner, but he normally takes into consideration the advice and recommendation of his engineers. Emergency contracts are used when, as in the Jerome Park situation, the job is too large for the Department, the scope and method of work are not fully determinable, and the operation must be performed within a limited amount of time, that is to say, in the Winter of 1966-1967, so the reservoir could be back in service in the Spring of 1967. Accordingly, in the Spring and Summer of 1966, discussions and consultations occurred within the Department concerning the best method to be used and the best contractor to do the job.

Marcus, meanwhile, in April, 1966, purchased 2,000 shares of Xtra stock at an average cost of about one hundred dollars a share. He purchased the stock on margin, which meant that he had to put up only a small portion of the purchase price in cash and the balance would be financed by the brokerage house, in this case Koenig & Co.

Shortly after the purchases, the stock went down drastically, falling to the low eighties. Koenig & Co. called

repeatedly for more money to cover the stock purchases. Itkin had invested $6,000 of his wife's money in the stock and Marcus turned to him for advice. Itkin suggested that he might be able to obtain some money from Motto. So Itkin visited Motto at his office in Long Island City, told him that Jim wanted help on stock he was buying, and asked for a $25,000 loan. Motto replied that he might make the loan but wanted to be sure that Marcus would "play ball" with him and also that he would retain Charles Imperial in his position in the Water Department. Itkin, later that day or the next, phoned Marcus and repeated the conversation, asking if Marcus would retain Imperial and "Do you want to play ball in the City?" Marcus agreed: "Okay, get the money from him."

When Itkin called Motto back, Motto said he could lend only $20,000, not 25, and wanted to see Marcus before he did so. They arranged a meeting in Motto's car on 46th Street, between Madison and Fifth, where Motto usually picked up his wife in the late afternoon after her work. At the meeting, which was in April, Marcus agreed to retain Imperial, assured Motto that the stock would go up, that the profits on it would be shared with him, and that he would "play ball." The money was not passed at that meeting but Itkin later received $12,000 from Motto, which represented a payment of $12,500, with interest deducted in advance. Itkin passed it on to Marcus who deposited it in his Koenig account, in the third week in April, 1966. The $7,500 balance of the loan was received and deposited in May.

Motto had told Itkin about the Jerome Park Reservoir in April and Itkin, in mid-May, casually mentioned it to Marcus. Marcus was surprised: how did Itkin know about it? Itkin replied that it was all over the street and rumored to be a contract larger than a million dollars. They then

discussed it a bit in general terms. Motto, however, kept after Itkin, trying to arrange for the handling of the contract. When this was reported to Marcus he understood it to mean "that he (Motto) would find a contractor or negotiate with a contractor and there would be a kickback." Late in May Motto told Itkin:

> Look, I did the job, I got you the 20,000. Now there is a big emergency contract in the City of New York and Carl D'Angelo, Jr. is pushing me to get it for him. I would like to make sure that Jim is going to do this for us because this is our first big one and it is the biggest that was ever given out.

And he said that if Marcus would go along, he would introduce Itkin "to someone higher up." Shortly thereafter, Itkin went back to Marcus. Marcus wanted to delay and hold up Motto since Motto had been slow in delivering the balance of the loan. When Itkin said they could not hestitate, Marcus gave his agreement. Itkin relayed this to Motto.

Very late in May, and late at night, Motto took Itkin to the Pancake House in Queens and there introduced him to Corallo. Corallo was with some other people so, as he got up to leave, only said "I am glad you are going to work on the contract with us, we will get together in a few days."

A few days later, but still in May, 1966, Itkin and Motto met with Corallo again at a diner in Queens. Corallo announced they were going to use Joe Pizzo as the negotiator, "Pizzo is going to handle it with Fried." And, he explained, this was "Henry Fried of McKay Construction," that Pizzo was his labor relations consultant and "they have been in many deals together." Corallo asked how much Marcus and Itkin wanted and Itkin replied that he

would have to talk to Marcus. Then Corallo left and Motto immediately complained to Itkin that he thought he could do better and would use D'Angelo instead of Pizzo.

Itkin related all this to Marcus and emphasized that they would have to pick a figure. About two weeks later, in mid-June, Itkin and Marcus met at Itkin's office, which was at 300 Madison Avenue. They calculated they needed about $75,000 to clear their stock debt. Since they thought the contract would run about one million dollars, they chose 7½ per cent as their figure which, if everything ran according to schedule, would give them the money they needed.

Itkin then met with Corallo and Pizzo at Gian Marino's Restaurant on 59th Street and Lexington Avenue. Itkin said that Marcus wanted 7½ per cent. Pizzo said it was too high. Corallo told Pizzo to get it. Pizzo said he would try. Soon after that and still in mid-June, Motto met with Marcus and Itkin on 46th Street and reported that negotiations were going terribly, they were asking too much money, and that he, Motto, could do better. Motto also asked Marcus to come to Atlantic City for his Union Convention.

Marcus did drop by the convention on June 18, 1966. Motto and Marcus and their wives chatted. Mrs. Motto mentioned what a difficult time she was having in getting her daughter into a good school in Greenwich, Connecticut, where they lived, and she asked Mrs. Marcus if she could help. Then, after some socializing with the various delegates, Motto and Marcus went off into a corner. Motto said that things looked bad with Fried and that he could do better than Pizzo. Marcus replied that he didn't know what to say.

For the rest of June and until mid-August matters lay dormant. Itkin went out of the country for July and Marcus was on vacation in Maine during early August. Once back in the City, Marcus and Itkin met with Motto, in the

third week in August, at the Chambers Street Restaurant in Queens. Motto suggested that they were asking too much money and that they should consider coming down. Late in August, Marcus lunched again with Motto but without Itkin and Motto again said he could do better than Pizzo in handling the negotiations. Motto related how well and how long he had known Fried, how they both shared an interest in horses, and how Fried had been "doing contracts" for a long time.

In early September, Motto, Itkin and Corallo met at the Pancake House in Queens and at the Loren East Restaurant in Manhattan to discuss the progress of the negotiations. Itkin learned for the first time at these meetings that Corallo and Motto were seeking 7½ per cent for themselves in addition to the 7½ per cent for Marcus. This, Corallo and Motto said, was too much, the price had to be lowered. Itkin complained, "Tony, I didn't think you were going to ask for the same amount. It is the Commissioner who is doing it and we want them to work for us." Motto replied:

> Listen, the guy that picks up the green should get 15 per cent for himself, and that is Pizzo, so there is nothing too much that you are asking. You come down. Why don't you talk to the Commissioner and see whether he will reduce it.

Itkin agreed to talk to Marcus but predicted he would be unhappy with it. Itkin relayed back the message from Motto and Corallo that they settle upon a smaller amount. Marcus, however, was concerned with his financial position. The price of Xtra had dropped to the low 40's and Marcus was getting calls from Koenig seeking more money for the margin account. In addition, he was considering purchasing more Xtra to lower his average in the stock.

Marcus suggested to Itkin that he ask if Corallo would lend him ten thousand dollars and if so, he would consider coming down.

On the morning of September 27, 1966, Marcus was sworn in as Water Commissioner. That afternoon he went over to see Itkin and Itkin said he was going over to the Loren East to see Corallo. He suggested that Marcus call there in a few minutes to see if the coast was clear. When Itkin arrived, he found Corallo and Pizzo seated with Armand D'Angelo who had been Water Commissioner in the Wagner Administration. Armand is the father of the Carl D'Angelo, Jr., a lawyer, named in the indictment as a co-conspirator. When Marcus phoned, Itkin told him to come over. As he arrived, he was met by Itkin near the hatcheck room. Marcus hesitated about going in when he saw D'Angelo. To delay, he made a few phone calls and as he finished, he saw D'Angelo leaving. Marcus and D'Angelo exchanged greetings and D'Angelo wished Marcus well in his new job. Marcus then went in and joined Pizzo, Corallo, whom he recognized as the man he had met in December at the diner near Motto's office, and Itkin at a new table.

Corallo stated they were asking for too much money, the price had to come down. Marcus replied that he did not know they had been seeking 7½ per cent on top of his share. Then he inquired about the loan. Corallo said if they came down, he would make the loan and that he thought there was going to be a deal. Itkin then turned to Marcus and suggested 5 per cent, a figure they had previously discussed between themselves. Marcus agreed to the 5 per cent. This meant a total of 10 per cent, instead of 15 per cent.

On September 28th, the next day, Corallo and Itkin met at 300 Madison Avenue. Corallo said the deal was dead, Pizzo had met with Fried and his brother and they just

would not pay that much. Itkin suggested they try Motto who had been seeking to handle the deal all along. Corallo said "fine." Later Itkin called Motto who agreed to handle it but said that a total of 10 per cent was too much and he would handle it at maybe 5. Itkin asked why. Motto replied:

> Because Carl told me Henry Fried won't pay a dime over five. He is used to paying five and that is all he is going to pay.

Itkin told Marcus that Motto was going to handle the negotiations. Itkin then called Corallo and related Motto's advice. Corallo suggested they get together with Motto and a meeting was arranged at a luncheonette on 46th Street. At the meeting which was around the end of the month, Motto stated:

> Look, Tony, I know I can get it, and there is no doubt in my mind, but I can't get more than 5 per cent. Now, is this going to be satisfactory to the Commissioner and is it going to be satisfactory to you? What are we going to do?

Corallo replied:

> If that's the best you can do, that's the best you can do, and the Commissioner will just have to go along with us.

Itkin then asked whether Marcus would get his loan if he went along at 5 per cent. Corallo said yes.

Early in October, Itkin told Marcus that he would have to come all the way down. Marcus inquired whether he would get his loan still and demanded that he get 3 per cent and the rest could share the remaining 2 per cent. When he got an affirmative answer, he agreed to the new

and final total of 5 per cent. Itkin next went to the Loren East Restaurant to meet Corallo. Itkin said that the Commissioner was agreeable to the 5 per cent and asked if Corallo had the loan money with him. Corallo asked whether Itkin was sure the Commissioner would agree. When he said yes, Corallo handed the money to Itkin in an envelope. Itkin then called Rappaport at the 300 Madison Avenue office and told him to come over and pick up the money since Itkin was leaving on a trip and did not want to take the cash with him. Corallo was wary of this arrangement but acquiesced.

Meantime Marcus was experiencing pressure on behalf of Grand from another source. Vincent Albano, Republican County Chairman for New York County, had been suggesting Grand and Fried since early in the fall. In response, Marcus had suggested to Albano that Fried send a letter to the Department listing Grand's qualifications and equipment. On September 7th Grand sent the letter. In mid-October, Albano called again and suggested that Marcus come to his suite at the Hilton Hotel to meet Fried and have a drink with him. Marcus did and was introduced to Fried with a comment by Albano that Fried had always been a heavy contributor to the Party and he, Albano, would appreciate any work that could be given to Fried. He repeated, he would be very appreciative.

Albano was not, however, the only Republican interested in the contract. Joseph Ruggiero, an official of the New York County Republican Party, had approached Marcus early in the fall and suggested that Oakhill Construction Company be considered for the job. Although it was not specifically mentioned at first, Marcus assumed that they also were offering a kickback. Ruggiero had followed up his suggestion with several phone calls. Although Marcus knew that some people from Grand had appeared at the

Water Department on Ocober 11th and that Groopman had suggested Grand was the best qualified contractor for the job, still, to keep the field open, Marcus told Groopman to interview some additional firms.

Towards the early middle of October, Itkin returned from his trip to find that Marcus needed more money to cover a purchase of another 2,000 shares of Xtra stock. In about the third week in October Marcus suggested that they bring in Corallo again, but this time as an investor for an additional $10,000. Itkin said he would talk to Corallo about it. When he called Corallo, Corallo wanted to know first whether they had a deal. To check, Itkin called Motto at his home in Connecticut. Motto replied he would meet them at 46th Street. A day or so later, Motto, Itkin, and Rappaport met at 46th Street. Motto said: "It's a deal, we got it for 5 per cent. Now, all we have to do is push this." He also said that the payoff would be made all at once. On the next day, Itkin contacted Corallo to tell him the good news, but Corallo already knew. Itkin asked about the investment. Corallo indicated he would invest but wanted a 4 for 1 margin at 40 and wanted to see Marcus before he agreed. Shortly thereafter, Marcus and Itkin drove over to the Tower East Restaurant at 72nd Street and 3rd Avenue to meet Corallo. Itkin went inside, found Corallo with some other people, and after a wait took him outside. While they were walking out, Corallo said that he wanted it understood that for his $10,000 he would get $40,000 worth of stock, the 4 for 1 deal, and that he would share in the profits, if any, when the stock went up. Itkin agreed and they walked outside to meet Marcus. Corallo asked Marcus: "Well, now that we have done Jerome Park can we do some other things?" Marcus agreed. Corallo then repeated his 4 for 1 proposal. Marcus again agreed and thanked him. Corallo later delivered the money to Itkin and Marcus used it to purchase the 2,000 additional shares of Xtra. Marcus and Itkin also borrowed another $5,000 from Motto.

Relative to the split-up of the 5 per cent, Itkin, Corallo, Motto and Marcus met at 300 Madison Avenue in late October. Corallo said to Marcus: "3 for you, 2 for us." Marcus understood that to mean that he would receive 3 per cent and that Corallo, Itkin and Motto would split the remaining 2 per cent.

Marcus, however, was still considering Oakhill. On November 2nd, Oakhill's representative had come to a meeting at the Water Department. Marcus sat in and was told, after the meeting, that Oakhill was qualified. That same day Ruggiero showed up at the Water Department and promised that if Oakhill received the award, Marcus would get 5 per cent of the price for himself. This apparently convinced Marcus, for around the 16th of November he told Groopman to prepare the letters notifying Oakhill that they were to receive the contract. Groopman in turn told Becker, his assistant, to make up the letters. Becker also called Oakhill to alert them to the job. On November 18th, the letters were typed and presented to Marcus who put the letters away in his desk until he could talk to Itkin, who was out of town.

When Itkin returned, he was first contacted by Rappaport who said that all hell had broken loose, Marcus had double crossed them by awarding the contract to Oakhill, and that Corallo and Motto had been up at 300 Madison Avenue constantly and were "wild." Itkin reached Motto one evening at his home in Connecticut and asked what was the problem. Motto was not amused:

> It's no problem, it's a complete double cross. Henry Fried just called me and told me that he found out that Oakhill was getting the contract. Now, what kind of a game are you playing? * * * You are playing with the wrong people if you're going to play this way.

Later in the week when Corallo reached Itkin, the refrain was the same. A day or two later, on November 21st or 22nd, Itkin went down to the Municipal Building to talk to Marcus. They went outside and walked around the Municipal Building. Marcus acknowledged that he was awarding the contract to Oakhill, saying he had been pressured into it. Itkin was frenzied and screaming:

> If you are talking about pressure, you're insane and you're crazy, they'll kill you before they let you get through this sort of thing, and what the heck did you take the money from both Tony and Danny if you are going to play this way.

Marcus kept walking, saying he didn't know what to do. Itkin warned him that he had better call Tony and Danny if he was going to persist in awarding it to Oakhill; if not, Itkin would call and say the contract is for Fried. Finally, Marcus gave in and said he would award the contract to Fried.

Marcus went back inside the Municipal Building. The next day he called Groopman into his office and told him to draw up the letters again, awarding the contract to Grand. He said he had to do it because of political pressure. Groopman directed his secretary to do so and called Grand to alert them. The letters were signed on that day, Wednesday the 23rd, and sent off to Grand who received them that Friday. The letters were dated the 18th because the secretary in her haste to rewrite the letters in the name of Grand rather than Oakhill had copied the date from the Oakhill letters. Itkin, meanwhile, had called Motto in Connecticut to notify him that Fried was getting the contract.

Now that the contract had been awarded, Marcus, Itkin and Corallo were eager to get the money. Marcus tried

to reach Motto both at home and at his office but failed. Corallo kept pushing Itkin to contact Motto. Finally, in December, Itkin did reach Motto. Motto suggested they meet and a meeting was set for mid-December at 300 Madison Avenue. Motto, Corallo, Itkin, Rappaport and Marcus were at the meeting. Marcus arrived late and was met outside by Itkin, who said: "Tony wants you to raise the roof with Danny and see if we can get the money." Marcus went in and demanded:

> Danny, you screamed and you yelled and you wanted your thing. Now I've done it. I've completed the contract. Where is the money?

Motto answered that Fried was very experienced, that he was hard to contact, that he could not pay the whole amount because he did not know how much the contract would amount to but he would pay 25 per cent as soon as a rough estimate could be made of the price of the entire contract. And that estimate would be made when the sludge had been lifted off the bottom. He promised that if they would agree, "Henry has told me I can ask for it and I will have it in a minute's notice." They agreed.

Later in December Itkin again came down to the Water Department to visit Marcus. He told Marcus that he had misunderstood the phrase "3 for you, 2 for us" at the October meeting. Itkin now said that the split was to be 2 per cent for Marcus, 1 per cent each for Itkin, Corallo and Motto; in other words the "you" referred to was Itkin and Marcus together. Marcus thought that this was a heck of a time to tell him but that nothing much could be done as the contract had been let. Itkin told him to relax for they had many other projects in the works.

Marcus and Itkin repeatedly tried to contact Motto in December and January as no money was produced. Marcus

did reach him in Greenwich but always there was an excuse. Most often the excuse was that Fried was hard to reach. A little past mid-January, Marcus and Itkin each found out from Rappaport that the first installment had been paid but not in a fashion likely to please them. Motto had received a payment in excess of $10,000. He had then taken something off the top and put it in his pocket, next he deducted $5,250 as repayment of his October loan with accumulated vigorish,[1] and then had deducted $4,000 as the share of himself and Corallo. This left a mere $750. When Rappaport complained, Motto gave him an additional $1,000. Thus, Rappaport received only $1,750 for Itkin and Marcus.

Soon after this initial payment, Corallo complained to Itkin that he had not received his share from Motto. Itkin kept calling and trying to push Motto but without success. Finally, in March, Corallo and Itkin received a call from Motto who told them to come over to 46th Street. They met Motto there and then he and Itkin walked over to the Hotel Roosevelt. There, in the men's room, out of a payment of $5,000, Motto handed over $3,000 for Marcus and Itkin and $1,000 for Corallo.

Towards the end of March, Corallo told Marcus and Itkin that he wanted to get out of the Xtra stock, which had gone up to somewhere in the 80s. Marcus and Itkin met with Corallo at 300 Madison Avenue and calculated that Corallo was due $18,000 on his original investment of $10,000. They then withdrew the money from the margin account and paid him.

Itkin kept pursuing Motto by phone in hope of further payments. He reached Motto in early April in Connecticut and Motto promised that he had a definite appointment with Fried and would come by 300 Madison Avenue after-

1. "Vigorish" is the underworld term for usurious interest charged by loan sharks. Motto was charging Marcus 2% per week.

wards. He did come by but said Fried had been busy and couldn't see him. Corallo was angry:

> Danny, do me a favor. Call him now, will you, and tell him you're coming over. Just do me a favor.

Motto replied he was just there. Corallo repeated:

I'm asking you to please do me a favor and call him. Motto got on the phone, called "Carl," not Fried, and said: "I'm coming up for that thing, see that you get it." Motto hung up and said to Corallo that he would see them later. Corallo said no and ordered Itkin to go along with Motto. They went over to 50th Street and 6th Avenue where Motto made another call, asked for Carl, and said: "I'm coming up, I'm downstairs." He then went up, came down, and suggested they walk across to a coffee shop. They sat down and then Motto slipped Itkin $3,000 under the table. Itkin pointed out that Corallo was waiting for his money back at the office and so Motto slipped an additional $1,000 under the table. Then Itkin went back to the office, paid Corallo and distributed the rest.

Within a week, later in April, a fourth payment was made. Motto called up, said "we're lucky," for he had received another payment and suggested they meet at 50th Street. They met there, Motto went upstairs, came down and then started driving Itkin back to his office. In the car he passed another $3,000 but this time Itkin did not ask for Corallo's share since he was not going to see him. He went back to the office. Corallo had dropped in so Itkin told him that Motto would pay him. Itkin later notified Marcus of both payments. On April 24th, 1967, work on the reservior was finished.

Corallo kept pushing for more money, so a meeting was set up at 300 Madison Avenue in mid-May. Corallo, Itkin, Rappaport and Marcus were there first. Corallo im-

mediately complained that he was not receiving much money. Marcus joined the refrain by complaining of the "vigorish" that Motto had charged on the loans. This surprised Corallo who then told Rappaport to call and see if Motto was on his way. Rappaport reported back that Motto had left. When Motto walked in, he and Corallo and Itkin went into another room. Corallo ordered Motto:

> Put the money down on the table and let me explain something. I haven't been getting my share. I've laid out a lot of money in other things. I want it off the top now.

Corallo took off a sum of money and then bickering ensued about distribution of the rest. It finally came down that the share of Rappaport, Marcus, and Itkin of this $5,000 installment would be $500. Itkin commented that this was insane, that Marcus was walking around outside waiting for the money, and all he could show would be $500. Motto suggested that Itkin tell Marcus they had a lot of expenses. Itkin went outside, told Marcus of the small payment. Marcus replied angrily: "Well, this is a hell of a note. That's the last deal I'm going through with these fellows." Itkin returned to Corallo and Motto, relayed Marcus' message, and urged that they were silly not to take care of him now if they wanted to do future deals. Corallo said to Motto: "Danny, all right, you and I will each give him a hundred dollars more." Motto walked outside, found Marcus in the men's room, and said "Here, this is for you," gave him the $200 and walked out. About 10 minutes later, Itkin ran into Marcus who complained "Big deal, they gave me $200 more, I'm supposed to be thrilled." Itkin explained that Corallo had directed Motto to give Marcus the $200 because of the vigorish payments. During the end of May, Itkin continued to push for further payment. Around the

end of the month, Itkin reached Motto finally and Motto said that they had to meet and told him to be at Motto's office the next day. Motto took the initiative:

> You know, you're screaming for another payment, Henry Fried just showed me a little book which shows seven payoffs. Now, what are you talking about?

There is very little money left for us.

Itkin replied: "Danny, that can't be. There were five payoffs. I picked it up four times, Charlie picked it up once." Motto replied:

> How would you know? You're running back and forth all over the world. Charlie probably picked up some extra payments.

Itkin replied that he was positive Rappaport had not picked up extra payments. Motto said to talk to him anyway but, regardless, there was only a few thousand dollars left.

Itkin then spoke individually to Rappaport, Corallo, and Marcus. Then the four met together at 300 Madison Avenue in mid-June. Itkin first accused Rappaport who swore that he hadn't taken anything extra. Corallo told him not to get excited but the only thing to do was to put it on Motto at a group meeting. A meeting was arranged at a luncheonette at 45th Street and 1st Avenue and Corallo, Itkin, Rappaport and Motto met. Motto insisted that they were confused, that Fried had it all down in a little book and asked whether either Itkin or Rappaport had any records. When they said no, he replied: "Well, all right, Henry Fried must be right, he has it down in a book." Corallo interrupted: "All right, I heard enough, I'm sick, I don't want to hear another word. How much more is left?" Motto said $2500. Corallo said that $1000 had to go to Pizzo for the work he did for which he had not yet received anything, and the rest would go to the Commis-

sioner. Motto agreed and said he would get the money from Fried. But shortly thereafter, Itkin heard from Motto that only $1600 not $2500 was due and owing. Corallo said all right but that still $1000 had to go to Pizzo and the Commissioner had to have the rest. And from then on throughout June and July and August, Itkin, Marcus and Corallo were to seek in vain for the remaining $1600.

In July, 1967, Fried phoned Marcus and invited him to have a drink. This was nothing new for throughout the Spring and Summer of 1967 Fried had called Marcus and invited him to have lunch or a drink with him. Marcus had consistently refused but this time he accepted. Fried suggested the Hotel Commodore later that afternoon. On the way there, Marcus picked up Itkin who suggested that after a few moments, Marcus should disappear and Itkin would see what Fried really wanted.

They walked in and found Fried already there. Marcus introduced Itkin to Fried as his friend and said that "anything you have to say you can say in front of him." They sat down and Fried discussed his horse farm and then invited them to visit the farm and also to use his boat at any time and with anybody. Itkin then started describing his Dominician Republic ventures, suggesting that Fried might do some work down there and Fried said that he thought it was a good idea and would like to hear more about it. Marcus excused himself to make a few phone calls but as he left said: "Anything you have to discuss you can discuss with Mr. Itkin." Once Marcus was gone, Fried said:

> I'm a lot older than you are and you are handling your deals with the City terribly, and if you will listen to me you won't get hurt, and you are handling it very badly. First of all, there is no reason to share with these other guys, what have you got to do with these type of people?

Itkin replied that he had worked with them on labor problems for a long time, but Fried continued:

> Well, do you know that I can handle the biggest payoffs in the City, there is nobody that can handle it better than I, and I can handle a quarter of a million dollars in green at any one time if the deal is big enough.

Itkin interjected:

> Well, that's very good, Mr. Fried, but you only paid 30,000 of a $40,000 contract, and that doesn't sound very big, does it?

Fried replied that he had paid 40, not 30. Itkin allowed that the matter was confused but asked if he acknowledged that he owed $1600. Fried agreed that he did and said he would pay it when the Comptroller gave final approval on some items and only then. Itkin was annoyed: "One minute we're talking about a quarter of a million, the next minute you don't want to pay the 1600." And he insisted that Fried would have to finish up this deal before Itkin could deal with him independently on any others. Fried said he would pay Motto within the week. Fried also mentioned that Itkin was fumbling the Consolidated Edison contract and that he had the right way of getting into Consolidated Edison. Itkin insisted they finish Jerome Park up first. Marcus came back, they exchanged pleasantries and the meeting broke up.

In early August, Itkin met again with Fried at the Commodore. Edward Orlando, another construction contractor, called Itkin to say that Fried wanted to meet with the two of them. Fried had been pushing for a cleaning contract to go to Orlando. Fried had become Orlando's silent partner on this venture to avoid the fuss that would follow

if it had been revealed that two such large contracts had gone to Fried. At the meeting, they discussed this, and then Fried gave Itkin $1500 for a contract previously awarded to Orlando. Fried again brought up the Consolidated Edison contracts but Itkin insisted that Fried pay up the balance of $1600 on Jerome Park before they settled on the new matter. Fried promised that he would pay off by the opening of his breeding farm on August 20th.

That August 20th, Itkin went up to the opening of the farm in upstate New York. He saw Fried who told him that he had paid the balance. Then Fried introduced him to Carmine De Sapio and suggested that they work together in the future. Marcus, who had been invited, did not go to the opening.

After the opening, Itkin contacted Motto. He mentioned that he had learned in a roundabout fashion that Fried had paid off. Motto wanted to know how Itkin knew, then denied receiving the money and said he would go up right away to get it. He left but the payment was not received. During the Summer and Fall of 1967, Marcus, Itkin and Corallo met several times at Itkin's apartment on East 15th Street to discuss the situation but their efforts were unavailing.

One of the investors in Conestoga had complained to the New York County District Attorney about Marcus. They had begun to investigate and had questioned him about certain large deposits in October, 1966, in his Koenig account. Marcus appeared before a state Grand Jury on December 8th and perjured himself by denying that he knew Carollo. Rappaport also was being invested and apparently had turned over to the authorities the joint checkbook he kept for Itkin. One day when Rappaport came back from a visit to the authorities, he noticed Corallo and an associate sitting in a car in front of his office. He

then went to Itkin who warned him that Corallo was mad and that he should leave town and call Itkin later in the week. Meanwhile, on December 12, Marcus resigned as Commissioner and went, with Itkin, to the FBI to give his version of the Jerome Park controversy.

Motto too found he was under investigation. In mid-November, he was served with a subpoena for the state Grand Jury. On the return date he was questioned about a purchase of stock by Itkin. The questioning was by an Assistant District Attorney and not before the Grand Jury, but Motto was told that at a subsequent date he would be required to appear and testify before the Grand Jury. On December 15th, he was served with a second state subpoena and on December 17th he was served with the federal subpoena. The other defendants were also served with the federal subpoenas on the 17th and told to be present on the 18th of December.

At the federal courthouse the morning of the 18th, in answer to subpoenas, were Fried, Marcus, Motto, Corallo, Pizzo, Rappaport, Itkin and D'Angelo.

This detailed chronological recital of the meetings, conversations, and acts of the various appellants, as the jury might fairly have concluded from the evidence in the case, renders it unnecessary, we think, to discuss the sufficiency of the evidence to sustain the charge made in the indictment. It is clear beyond any doubt that the jury could have found the existence of a conspiracy to negotiate a deal with Fried and S. T. Grand, Inc., to the effect that, upon the award of this large contract, Fried would pay Marcus and his associates a kickback of 5 per cent of the amount paid by the City; that the conspirators reasonably anticipated the use of interstate telephone communications between the various conspirators and Motto, who lived in Greenwich, Connecticut, and in fact on numerous occasions telephone communications were effected both to and from

Greenwich, Connecticut, by one or another of the participants in the conspiracy; and that the joint venture continued during the ensuing several months while the bribe money was being collected and distributed. Indeed, we do not see how the jury could find otherwise without repudiating the testimony of Marcus and Itkin as unworthy of belief. Obviously, the jury did not do this, as Judge Weinfeld instructed the jury to acquit the appellants "if you do not believe Marcus and Itkin, * * * since the structure of the government's case in large measure rests upon their testimony." The active participation of each of the appellants in the scheme is also established by an abundance of proof of his own words and deeds.

Other parts of the record will be discussed later in this opinion in connection with claims by appellants, or some one or more of them, that we must dismiss the indictment or order a new trial because of certain allegedly erroneous and prejudicial rulings by the trial judge.

PART II

ALLEGED ERRORS IN THE INSTRUCTIONS TO THE JURY AND IN REFUSALS TO CHARGE AS REQUESTED.

A

Proof of Events After the Award of the Contract to Fried on November 23, 1966 Was Relevant to the Crime Charged in the Indictment.

Paragraph 2 of the indictment charged the defendants with using an interstate facility, the telephone, between Greenwich, Connecticut and New York with intent to:

> promote, establish, carry on and facilitate the promotion, establishment, and carrying on of an unlawful activity, said unlawful activity being bribery in viola-

> tion of Articles 34 and 170, Sections 372, 378 and 1826 of the Penal Law of the State of New York, and thereafter said defendants would perform and attempt to perform acts to promote, establish, carry on and facilitate the promotion, establishment and carrying on of said unlawful activity.

And as one of "the means" by the conspirators to "carry out" the scheme, Paragraph 3(j) of the indictment alleges:

> j. Defendants James L. Marcus, Herbert Itkin, Antonio Corallo, Daniel J. Motto and Charles J. Rappaport did make and receive and cause to be made and received telephone calls between New York, New York, and Greenwich, Connecticut, concerning the payments of money from defendants Henry Fried and S. T. Gran, Inc. and distribution of the same by defendant Daniel J. Motto.

As the events subsequent to November 23, 1966 were plainly the "carrying out" of the conspiracy and as the allegation of interstate telephone calls between New York and Greenwich during the period of the collection and distribution of the bribe money is unambiguous and specific, we must conclude that appellants were adequately informed that the proofs would include events subsequent to November 23, 1966.

The very cases cited by Corallo in support of his argument that all evidence of events subsequent to November 23, 1966 should have been excluded, are to the contrary. In *Kubacki v. United States,* 237 F. Supp. 638 (E. D. Pa. 1965), the defendants were charged with conspiring to obtain kickbacks for municipal officials in return for orders of parking meters. The award of the contracts was made before the effective date of Section 1952, but the payments were made afterwards. Defendants argued that the state offense of bribery was completed before the effective date

of the statute and hence there was no indictable offense. The District Court rejected the argument, the interstate travel

> was undertaken for the purpose of making the payoff contemplated as the *quid pro quo* for the award of the contract * * *. That conspiracy continued until the accomplishment of the last of its objects, delivery of the money and the clock. 237 F. Supp. at page 643.

Here also the payments and the use of the interstate phone to obtain them from Motto were part of the original agreement and certainly facilitated and helped to carry on the offense of bribery. And the same result, involving the effective date of the statute, was reached in *United States v. Wechsler,* 392 F. 2d 344 (4th Cir. 1968), *cert. denied,* 392 U. S. 932 (1968), where it was pointed out that while an indictable offense may have been committed at an early stage in the conspiracy, the conspiracy itself continues until its objects are attained, that being the completion or consummation of the crime.

Corallo argues that New York law demands that we find the offense of bribery ends with the award of the contract because that is when the "wrong done to the people is complete by the corruption of the public servant." None of the cases interpreting Section 1952 support this statement, as "Reference to the state law is necessary only to identify the type of unlawful activity in which the accused was engaged." *McIntosh v. United States,* 385 F. 2d 274, 276 (8th Cir. 1967). See also *United States v. Nardello,* 393 U. S. 286 (1969); *United States v. Wechsler, supra,* 392 F. 2d 344 (4th Cir. 1968), *cert. denied,* 392 U. S. 932 (1968); and *Kubacki v. United States, supra,* 237 F. Supp. 638 (E. D. Pa. 1965).

Moreover, even if the New York substantive law of bribery were applicable and controlling, it is interesting

to note that the New York cases give no support to Corallo's argrument. Thus, in *People v. Gibson*, 191 N. Y. 227, 231 (1908), it was said:

> The bribe by which this influence is to be exerted may be paid in the present or in the future and after the influence has been exerted. The agreement and the receipt together constitute a single crime, and if the briber deems it safer for his purposes to postpone payment till he has secured his consideration, the consummation of the offense and the running of the statute will be delayed till that event has occurred.

B

WHATEVER MAY HAVE BEEN ITKIN'S CONTACT WITH THE FBI NOTHING IN THIS RECORD SUPPORTS APPELLANTS' CLAIM THAT HE PARTICIPATED IN THE CONSPIRACY AS A GOVERNMENT AGENT.

The path of the prosecutor in a conspiracy case is full of snares and pitfalls. As the conspirators run for cover a favorite diversionary tactic is to spread confusion by pursuing digressions suggested by proof having only a tangential bearing on the case. Just such an opportunity presented itself when a reference was made to the fact that Itkin claimed to have had some contact with the FBI since as early as 1962.

1.

Itkin's Participation in This Conspiracy Was Wholly on His Own. The Record Does Not Sustain Appellants' Claim that Itkin Participated as a Government Agent Pretending to Be a Conspirator.

Whatever Itkin's contact with the FBI may have been, William Veriker, the FBI agent referred to by Itkin as his

contact with the FBI, was available and counsel for Corallo said "We will call the agent." But neither he nor any of the other counsel for appellants did call Veriker or any other witness on the subject. So far as the subject has any relevance to the case, the only pertinent question is whether there was any evidentiary basis for appellants' contention that Itkin's participation in the conspiracy charged in this case was as a Government Agent, in cooperation with the FBI, to help appellants to provide proof of their guilt. On this subject Itkin's testimony is explicit and clear:

> The Court: Were you engaged in this on your own, the Jerome Park Reservoir? That was your own activity, was it not?
>
> The Witness: Yes, sir.
>
> The Court: You were acting on your own there as a participant?
>
> The Witness: Yes, I was.
>
> Q. You were doing this in order to turn the information over to the Government, is that correct? A. No.

Itkin never deviated from this position.

It is interesting to observe how the individual participants in the conspiracy endeavored, each in his own particular fashion, to gain some advantage from Itkin's contact with the FBI, whatever it may have been. Itkin used it as a sort of anchor to windward throughout. Doubtless it helped him persuade the prosecutor to consent to a severance as to him. He claims he revealed all to the FBI in July, 1967, after the last payment had been received from Fried and the conspiracy was in effect over. In any event he pocketed the money, and it is something of a coincidence, as pointed out in summation by counsel for Rappaport, that

Itkin should have waited until the state Grand Jury had begun its investigation, and the District Attorney of New York County was hot on his heels, to decide to tell all to the FBI.

If Rappaport had been working in an indirect sort of way with Itkin for the purpose of ultimately revealing the Marcus bribery conspiracy to the FBI, he could have taken the witness stand in his own defense and told his story. But he did not. Instead, Rappaport's counsel conducted a prolonged cross-examination of Itkin, called the witness Reiburn, who testified about the attempted purchase by Rappaport in May and July of 1967 of a tape-recorder, and finally called as a witness a former office associate who gave some vague testimony to the effect that Rappaport explained his neglect of some negligence cases by saying he was working on "something connected with the public interest and we are doing the right thing." This same lawyer also testified that Itkin came into the office in December, 1967 and said, with reference to Rappaport, "I don't know where he is. He must be talking to the District Attorney." Perhaps this indirect approach on the bias helped to convince the jury that Rappaport was not guilty. It is just as likely that the verdict exonerating Rappaport was based on his youth, on the fact that the indictment did not charge him with receiving any part of the bribe money, and on the claim of his counsel that he had been the innocent dupe of Itkin. We cannot see, as appellants argue, how any of this testimony substantiates the claim that Itkin was only a pretended and not a real co-conspirator.

Corallo and the other appellants use Itkin's reference to the FBI in a variety of ways. Their principal contention is that Itkin was not a conspirator at all but only a Government Agent pretending to be a conspirator. From

this premise, apparently urged as matter of law, it is argued that it was error to describe Itkin as an accomplice and that it was error not to strike from the record Itkin's testimony of the hearsay declarations of Marcus and appellants as co-conspirators. As appellants did not choose to call anyone from the FBI as a witness, there is no testimony to support appellants' assertion that from first to last Itkin was working with the FBI and under the directions of the FBI in order to help appellants to commit the crime charged in the indictment. The testimony of Itkin on the point, as quoted above, is that whatever else he might have been doing with the FBI to uncover the machinations of the underworld, he was in this venture entirely on his own and acting wholly without the knowledge of the FBI until he found it to his interest to tell the FBI, after the last installment of the bribe had been paid.

It will serve no useful purpose to discuss the various arguments in detail. We find no concessions by the prosecutor that support the basic contention that Itkin functioned not as a conspirator but as a Government *Agent Provocateur*. Typical of the remaining bits and scraps is a quotation from a statement by Itkin when he was engaged in vilifying the FBI for not furnishing protection for the children of his first wife. In his statement, as written down by the FBI, Itkin said he "was pulling out" and was "going to make a real stink about this whole FBI deal" and "How I enticed and entrapped not only Marcus and Rappaport but how I enticed several of the others." Itkin said he lied about Rappaport and as he denied any activity as a Government Agent in the formation of and carrying out of the conspiracy, it is plain the statement has no probative force with respect to any of the issues in the case except that of Itkin's credibility.

Thus we conclude it was not error for the trial judge to refuse to exclude or strike out Itkin's testimony on the

ground that he was in fact a Government Agent and only a pretended participant in the commission of the crime.

2.

The Request for Instructions on the Subject of Entrapment Was Properly Denied.

It is assigned as error by Fried that the trial judge refused to instruct the jury on the subject of entrapment. As the record is replete with proof of other kickbacks participated in by Fried and of a number of other new contracts he had in contemplation, it is difficult to picture Fried in the role of an innocent lamb, without any propensity to wrongdoing. And any theory of entrapment flies in the face of Fried's testimony of how he lay awake frightened by Pizzo's threats of what might happen to Fried if he did not pay the "finder's fee" demanded by Carl D'Angelo and how, at a time when Corallo, Motto and Itkin were engaged in a dispute as to whether Fried had made pay-offs aggregating $30,000 or $40,000, Fried answered Itkin's question "What did you pay on that Jerome Reservoir" by saying "$40,000." Despite Itkin's statement about how he "enticed Marcus and Rappaport and several of the others," the idea of entrapment in the context of the evidence in this case is absurd.[2]

---

2. On the subject of entrapment Judge Weinfeld ruled:

The Court: That was a statement which he (Itkin) explained at the time. The fact of the matter is that the evidence is clear beyond any question in the Court's view that this was an independent venture of his own, that he participated on his own, it was not initiated by the government in any respect, and that it was after the entire transaction was over that he informed the government as to the nature of the transaction.

I find no basis of any kind to the claim of entrapment. The evidence is clear on it. The fact he informed with respect to other transactions during this particular transaction does not lead to entrapment of anybody here.

3.

The Trial Judge Properly Charged That in Prosecutions in Federal Courts for the Commission of Federal Crimes the Testimony of an Accomplice Requires No Corroboration to Sustain a Conviction.

As part of his instructions on the subject of the credibility of the witnesses, Judge Weinfeld said:

> The law does not prohibit the use of informers, but whether you approve of their use is not to enter into your consideration of this case. In certain types of crime the government, of necessity, is frequently compelled to rely upon the testimony of accomplices, persons with criminal records, or informers. Otherwise it would be difficult to detect or prosecute some wrongdoers, and this is particularly true in conspiracy cases. Often it has no choice in the matter. It must take the witnesses to the transactions as they are.
>
> There is no requirement in the Federal Court that the testimony of an accomplice, an informer, or one with a criminal record be corroborated. A conviction may rest upon the uncorroborated testimony of such a witness if it is found credible and reliable. However, the testimony of such a witness should be viewed with great caution and scrutinized carefully.
>
> The fact that Itkin is an informer, as well as the fact that he and Marcus are accomplices, that Marcus has a criminal record and has admitted perjury and other state crimes, the fact that Itkin has admitted acts of criminal conduct and other moral derelictions, should be considered carefully by you as bearing upon the credibility of each.

These instructions are claimed to be erroneous in two respects.[3] First, it is said that Itkin was not an accomplice but a Government Agent only pretending to be an accomplice. We reject this claim for the reasons we have already discussed. Second, it is the contention of appellants that the New York State rule requiring corroboration of an accomplice should have been applied, because the conspiracy was alleged to be one to use an interstate facility to carry on bribery under New York State law. Judge Weinfeld applied the federal rule and we agree with him.

The broad purposes of this statute are clearly stated in *United States v. Nardello, supra,* 393 U. S. 286 (1969). The reference to "bribery * * * in violation of the laws of the State in which [it is] committed" is to the substantive offense. To hold that the federal court in which a defendant is tried on a criminal charge of violating Section 1952 must apply the rules of evidence and procedure that are in force in the State where the crime was committed would clearly be giving the statute "an unnaturally narrow reading." The conduct of criminal trials in the Courts of the United States is governed by the Federal Rules of Criminal Procedure and by rulings of the federal courts in matters of procedure and practice not explicitly or by clear implication covered by these Rules. Federal law does not require corroboration of accomplice testimony to sustain a conviction. *Caminetti v. United States,* 242 U. S. 470, 495 (1917); *McCullough v. United States,* 403 F. 2d 1013, 1015 (9th Cir. 1968); *United States v. Carrique,* 316 F. 2d 186,

3. The requests to charge are so crudely drawn that they do not raise the point argued in Corallo's brief, that "the court refused defendant's request for an instruction requiring the jury to acquit unless there was corroboration of accomplice testimony." No such request was submitted and Request No. 24 is merely to the effect that under New York law the testimony of an accomplice must be corroborated. We discuss the alleged error, however, for the guidance of trial judges in future cases, as the question is likely to arise again.

187 (2d Cir. 1963); *United States v. Agueci*, 310 F. 2d 817, 833 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963).

C

THE REQUESTS TO CHARGE ON THE SUBJECT OF EXTORTION WERE PROPERLY DENIED.

Corallo seems to argue that it was Marcus who extorted money from Corallo and Fried. Of course, there is no such proof. There is proof by Fried that D'Angelo and Pizzo extorted $40,000 from Fried by threats of violence to his person. But neither Rappaport nor any of appellants other than Fried testified in his own defense. Marcus and Itkin testified to the bribery conspiracy and Judge Weinfeld in considerable detail told the jury that they could not convict appellants unless they believed Marcus and Itkin, and found established to their satisfaction beyond a reasonable doubt that appellants and each of them had participated in a conspiracy to violate the New York State bribery laws in a manner which reasonably contemplated the use of interstate telephone calls. In the face of this record, and in view of the complete failure of Corallo to make any such fantastic claim during the progress of the trial, we think there was no occasion for Judge Weinfeld in his instructions to mention the subject of extortion, except in connection with Fried's testimony concerning the extortion allegedly practiced upon him by D'Angelo and Pizzo. These instructions were given and we hold them to be wholly unexceptionable.

At the close of the Government's case counsel for Corallo, in support of his motion for a judgment of acquittal, did claim that what he calls "the defense of extortion" was established as matter of law. *A fortiori*, and for the reasons above stated, this motion was properly denied.

The requests for instructions to the jury are a motley lot. They are filled with ambiguities, erroneous statements

of law and argumentative matter. It is pertinent to recall our admonition, in *United States v. Kelly*, 349 F. 2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U. S. 947 (1966): "it is not the function of the trial judge to put lengthy, confusing or inaccurate requests for instructions through a winnowing or sifting process in an endeavor to select what is good and reject what is bad." And the very important corollary is: if the judge's charge is comprehensive and accurate "it is not error to refuse to repeat substantially the same or a different statement of the same principles of law in the language submitted by counsel." *United States v. Kelly, supra*, 349 F. 2d 720, 760 (2d Cir. 1965), *cert. denied*, 384 U. S. 947 (1966).

In this case Judge Weinfeld's instructions cover every phase of the case comprehensively, the review of the evidence produced by both the Government and the defendants is a model of accuracy and helpfulness to the jury, despite appellants' claims to the contrary, and we find no merit in the contention that there were numerous errors requiring a reversal of the judgment of conviction as against any of the appellants.

PART III

AFTER CONSIDERING "ALL THE EVIDENCE IN THE CASE" THE JURY WAS WARRANTED IN FINDING THAT FRIED AND GRAND PARTICIPATED IN THE CONSPIRACY WITH REASONABLE ANTICIPATION THAT THE INTERSTATE TELEPHONE WOULD BE USED BY THE CONSPIRATORS OR SOME OF THEM TO EFFECT THE PURPOSES OF THE CONSPIRACY.

Fried claims that there must be direct evidence that Fried made some of the telephone calls to Greenwich, Connecticut, or at least direct proof that he knew that Motto's

home was in Greenwich. The basic fault in the reasoning of Fried and Grand lies in their misinterpretation and misapplication of the requirement that Fried's participation in the conspiracy must be established by his own words and deeds and not by the declarations of the other conspirators. Ever since the writing of Judge Learned Hand's opinion in *United States v. Dennis*, 183 F. 2d 201, 230-1 (2d Cir. 1950), affirmed, 341 U. S. 494 (1951), this Court, in a long series of opinions [4] has sought to lay to rest the erroneous supposition that in a joint conspiracy trial the proof sufficient to establish the participation of a defendant in the conspiracy is the same as the proof sufficient to carry the case to the jury as against that same defendant. Proof of the participation of a particular defendant in the conspiracy must be by his own words and acts because such evidence alone will suffice to establish the agency relationship required to warrant the trial court's submission to the jury of all the evidence bearing on the guilt or innocence of a particular defendant, including the declarations of the various persons shown to be co-conspirators.

We have already discussed the abundance of evidence of Fried's own words and deeds that was more than sufficient to warrant a finding that he was a participant. It will serve no useful purpose to add to what we have already said on this subject. We turn then to a consideration of what the whole record, including the declarations of co-conspirators, discloses as Fried's knowledge of the likeli-

4. *United States v. Ragland*, 375 F. 2d 471 (2d Cir. 1967), *cert. denied*, 390 U. S. 925 (1968); *United States v. Padilla*, 374 F. 2d 996 (2d Cir. 1967); *United States v. Nuccio*, 373 F. 2d 168 (2d Cir.), *cert. denied*, 387 U. S. 906 (1967); *United States v. Stadter*, 336 F. 2d 326 (2d Cir. 1964), *cert. denied*, 380 U. S. 945 (1965); *United States v. Borelli*, 336 F. 2d 376 (2d Cir. 1964), *cert. denied sub nom. Mogavero v. United States*, 379 U. S. 960 (1965); *United States v. Stromberg*, 268 F. 2d 256 (2d Cir.), *cert. denied sub nom. Lessa v. United States*, 361 U. S. 863 (1959).

hood of use of the interstate telephone service to and from Motto's Greenwich home by Motto and the other co-conspirators.

Motto was the key man in the conspiracy. It was he who suggested the kickback idea to Marcus in the first place. It was Motto who finally persuaded the others to let him do the negotiating with Fried. It was Motto who arranged for the services of D'Angelo and it was he who acted as the distributor of the various successive instalments of the bribe as they were paid by Fried. That the operations of the conspiracy required secrecy and caution is evident from the different diners, luncheonettes, restaurants and other places in cars or on street corners, often at night, as the prolonged negotiations finally produced agreement on the 5 per cent and the shares allotted to Marcus, Itkin, Motto and Corallo. There were also numerous meetings at various places, attended by varying groups of the conspirators, as the payments were received and passed around, always in cash. The use of the telephone was necessarily almost constant and prolonged. The record is replete with proof of a large number of interstate calls to and from Motto's home in Greenwich where Motto maintained a telephone with an unlisted number. Motto gave this unlisted Greenwich number to Marcus. Itkin, who had worked with Motto on other matters at an earlier time, also had Motto's unlisted number. It is not disputed that Fried also had "a private wire."

Motto also had known Corallo previously and it was he who introduced Corallo to Marcus and Itkin. All these friendships had been formed before the Jerome Park Reservoir question arose. As the whole venture revolved around Motto so it is reasonable to expect that the interstate facilities would be used to keep in touch with Motto, the originator and the moving spirit behind the whole scheme.

Moreover, we think the extensive references in the record to interstate telephone calls that were actually made justify the inference that the use of interstate telephone calls was not a casual and incidental occurrence but the fulfillment of an integral part of the conspiratorial consensus. We do not see how the jury could have found otherwise, considering the extensive evidence of the disputes not only during the period of negotiation, but also over the time, size and split-up of the pay-offs. It was necessary to keep in touch with Motto to resolve these disputes, and, given the familiarity of the conspirators with Motto, there was sufficient evidence to justify the inference that the conspirators agreed to use the interstate telephone, or reasonably expected to use it in furtherance of the ends and purposes of the conspiracy.

Was there knowing participation by Fried in this conspiracy? Under the authorities to be discussed shortly, this depends upon the degree of participation by Fried and the extent to which he was intimate and on familiar terms with the other conspirators, especially Motto. The greater Fried's involvement in the complicated operations of the scheme and the payment of the various instalments of the pay-off and the greater his intimacy with Motto, the more reasonable is the inference that Fried knew the interstate telephone service would be used or actually was used.

In August, 1966, Motto lunched with Marcus and Itkin and once with Marcus alone. At both these meetings, and especially at the luncheon with Marcus alone, Motto went on and on about how well he knew Fried, how they shared an interest in horses and how "he had known him for a long time, he was a man that had been doing contracts for a long time, over a period of years."

In November, 1966, when Marcus decided to award the contract to Oakhill, Fried called Motto directly to complain

of the switch. When Itkin reached Motto in Connecticut to find the source of the trouble, Motto said:

> It's no problem, it's a complete double cross. Henry Fried just called me and told me that he found out that Oakhill was getting the contract.

Similarly, there is much other evidence of continuing direct contacts between Fried and Motto throughout the record. At the mid-December meeting, for example, where Corallo, Itkin and Marcus tried to push Motto for the payment of the money, Motto responded by relating how experienced Fried was, how hard he was to contact, and how he had promised to make a payment of 25 per cent once a rough estimate was made. He said:

> Henry has told me I can ask for it and I will have it in a minute's notice.

Fried himself admits that he, D'Angelo and Motto spent a day together in late Spring of 1967, driving up to Fried's horse farm and talking to one another for the whole day. This indicates more than a casual or incidental friendship.

Soon after that, towards the end of May, when the dispute over the amount remaining reached a high point, Motto again indicated that he had seen Fried directly. Motto told Itkin:

> You know, you're screaming for another payment, Henry Fried just showed me a little book which shows seven payoffs. Now, what are you talking about? There is very little money left for us.

And a few weeks later, when Motto again met with Itkin and also Corallo and Rappaport, he repeated that Fried had it down in a little book which he had seen.

In July, 1967, when Fried, Itkin and Marcus met at the Commodore on Fried's invitation, Fried, Itkin testified,

kept saying how badly the deal was being handled and how there was no reason to work with Motto and Corallo. When Itkin had pressed for the balance due before discussing other deals, Fried replied:

> All right, I'll pay Danny Motto the money back within a week.

In August, 1967, when Itkin, Orlando, and Fried met again at the Hotel Commodore, Fried again promised to pay the balance due to Motto—but now the final payment is to be made by the opening of the horse farm on August 20th. And at the opening, Fried said that he had "finished up with Danny."

On December 18, 1967, the various conspirators were summoned to the Federal Grand Jury. On that date Fried made several statements which showed his knowing association with the conspiracy. Marcus saw Fried outside the Grand Jury room, near the elevators, and Fried said to him:

> They are on a fishing expedition, they haven't got anything on us.

Itkin testified also that Fried spoke to him in the anteroom to the Grand Jury and that he had been cautioned by Fried:

> They'll never get anything on us if we all shut up.

And later that day, while they were waiting in line to be fingerprinted, Marcus testified that Fried said to him:

> They haven't got anything on us. If we all keep quiet, we will be all right.

Fried's counsel misread the purport of *Crimmins v. United States,* 123 F. 2d 271 (2d Cir. 1941) and *Twitchell v. United States,* 313 F. 2d 425 (9th Cir. 1963), *vacated* and *remanded sub nom. Rogers v. United States,* 376 U. S. 188 (1964) (vacated for reconsideration on substantive counts

only). These cases distinguish between cases where it is held that a peripheral conspirator, having no knowledge of the operations of the conspiracy as a whole, cannot be convicted without proof indicating some knowledge on his part of the interstate features of the venture, and other cases, such as the one before us now, where the totality of the proofs, including testimony of declarations and acts of co-conspirators in furtherance of the illegal scheme, reveal the appellant as one who was right in the thick of things as a central member, manipulating and closely supervising the carrying out of the principal object of the conspiracy. In this type of case the proofs are held to be sufficient if the evidence warrants an inference that the particular defendant directly agreed to a scheme in which it was known that the likelihood of use of interstate telephone calls was great. As aptly said in *Twitchell* at page 429: "The degree of knowledge required of the interstate aspect thus increases as the defendant's connection with the core agreement becomes more tenuous." Here the proof of Fried's "connection with the core agreement" is overwhelming. There is nothing tenuous about it.

PART IV

THE CONDUCT OF THE TRIAL

A

The Grand Jury Testimony of Fried and Motto Was Properly Received and It Was Not an Abuse of Discretion to Deny the Motions for a Severance.

I

Some time ago, and consistently over the years, the Supreme Court has instructed trial judges in no uncertain terms to give clear and explicit limiting instructions during

the trial of joint criminal conspiracy cases, so that the jurors would understand those instances where certain evidence is received only as against certain specific defendants and with respect to certain specific issues. *Blumenthal v. United States,* 332 U. S. 539, 559-60 (1947). We find not the slightest indication in *Bruton v. United States,* 391 U. S. 123 (1968) that the use of such limiting instructions is to be abolished or curtailed, except in the context of the overruling of the Court's former holding in *Delli Paoli v. United States,* 352 U. S. 232 (1957), that is to say, in cases where a co-defendant's confession implicating another defendant in the commission of the crime, is received with limiting instructions even though the co-defendant making the confession does not testify and thus afford the confrontation required by the Constitution.

In this case Judge Weinfeld, an able and experienced trial judge, followed the teaching of *Blumenthal* to the letter, and, in our judgment, made his limiting instructions "impregnable." A prime example is his treatment of the testimony of Fried and Motto before the Grand Jury. These two appellants gave no testimony that could even remotely be considered as involving any of the appellants in any wrongdoing whatever, much less as indicating that they or any of them participated in the conspiracy as charged. What Motto and Fried did before the Grand Jury was to tell a variety of brazen lies[5] that served their purpose to conceal their participation in the course of events. It is not contended that any of the other appellants had anything to do with this perjury or that they were in any manner involved in it.

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5. Motto denied having anything to do with the pay-off and Fried denied paying money to anyone. Fried said he never heard of Corallo and Motto testified that, except for chance encounters, he had known Corallo only years ago when they grew up in the same part of town.

Accordingly, Judge Weinfeld, both at the time this Grand Jury testimony of Fried and Motto was received, and in his instructions to the jury at the close of the case, told the jurors, in the most specific and emphatic manner, that this testimony was received only as against Fried and Motto, respectively, on the issue of the intent of each of these two, separately, and that the jurors must under no circumstances consider any part of this testimony in their determination of the guilt or innocence of the other defendants. This is a far cry from such situations as were presented in *Delli Paoli* and *Bruton*.

We think this Grand Jury testimony was properly received and that there was no abuse of discretion by Judge Weinfeld when he denied Corallo's motion for a severance. The distinction between this case and the denial of the motion for a severance by appellant Shuck in *United States v. Kelly, supra,* 349 F. 2d 720 (2d Cir. 1965), *cert. denied,* 384 U. S. 947 (1966), which we reversed, is of critical importance. In that case voluminous testimony given before the SEC by the principal defendants was entirely devoted to the excoriation of Shuck and a series of accusations that Shuck was the source of various false and fraudulent representations made in connection with his sale of the stock. It took hours to read all this testimony to the jury. None of it was admissible against Shuck, and we found it difficult to see any reason for admitting the testimony at all, as it accomplished no other purpose than to accuse Shuck of misconduct. Moreover, the limiting instructions were of the most perfunctory sort.

Corallo's motion for a severance, made prior to the trial, was based upon what it was feared Rappaport would testify, fell of its own weight when Rappaport gave no testimony at all. In any event, the motion in so far as it referred to Rappaport was wholly lacking in substance.

We shall not again refer to the severance feature of the case. All of the appellants were properly joined as defendants and nothing occurred during the trial to require a severance as to any of them.

It is said by some or all of the appellants that the calling of these men to testify before the Grand Jury was mere pretense and a measure of harassment, in order to obtain damaging admissions. If we put ourselves in the position of the prosecutor at the time the subpoenas were served on December 17, 1967, returnable at the United States Courthouse on the morning of December 18, it was apparent from the *ex parte* statements of Marcus and Itkin that the prosecution was dealing with a long, devious and complicated conspiracy, full of scheming and trickery. There had already been a certain amount of running to cover by the various co-conspirators. No investigation would be adequate and in any sense complete without at least an effort to glean some small harvest of information from those suspected of being involved. The prosecutor had by no means wholly developed his case. This was not a case of pressure upon some single, indigent and perhaps ignorant person. All of those who were summoned were sophisticated people, with varying motives to save themselves at the expense of some of the others, if they could, and possessed of information of importance to the prosecution. Several of them were lawyers. Those present were: D'Angelo, Rappaport, Fried, Motto, Coralllo, Pizzo, Marcus and Itkin.

Under these circumstances we see no reason for the curtailing of the investigatory powers of the Grand Jury. Indeed, the cases in this Circuit uniformly approve the procedure that was followed here. *United States v. Wolfson,* 405 F. 2d 779, 784-85 (2d Cir. 1968); *United States v. Capaldo,* 402 F. 2d 821, 823-24 (2d Cir. 1968); *United States*

v. Fortunato, 402 F. 2d 79, 82 (2d Cir. 1968); *United States v. Winter,* 348 F. 2d 204 (2d Cir. 1965), *cert. denied,* 382 U.S. 955 (1965).

II.

It is claimed that the warning required by *Miranda v. United States,* 384 U. S. 436 (1966), was not given and that the Fifth and Sixth Amendment rights of Fried and Motto were not protected.

In the Grand Jury room, Motto and Fried were separately warned that they had a right to remain silent, that the Grand Jury was investigating the offense of using an interstate faciltiy to further the state crime of bribery of a municipal official, that each was the subject of the investigation, and that he had a right to consult with an attorney. They were also asked whether they had attorneys present. Fried said he did, Motto said he did not. Finally, they were told whatever they said might be used against them. We have set forth the full warnings in the margin.[6] These warnings were completely adequate.

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6. Grand Jury warnings to Daniel Motto:

"'Q. Please state your name. A. Daniel Motto, M-o-t-t-o.

Q. And your address. A. 121 Birch Lane, Greenwich, Connecticut.

Q. Mr. Motto, let me advise you that the grand jury before you is investigating alleged violations of Title 18, United States Code, Section 371. That section makes it a crime to conspire to commit any crime against the United States, to commit any offense against the United States.

There is also a Section 1952 of the same Title which makes it a crime to use any interstate facility or telephone or to travel, or the mails, in furtherance of certain particular State offenses. In this case the State offense that the grand jury is investigating is the offense of bribery of a local official, namely a municipal official. Do you understand that? A. Yes.

Q. And it's investigating conspiracy concerning this. I do want to advise you that you have a right to refuse to answer any questions the grand jury may ask you today the answers to which you feel they tend to incriminate your personally. Do you understand what I just said? A. Yes.

Q. However, should you answer questions, those answers

Motto has filed a Supplemental Appendix containing an *ex parte* affidavit by Mr. LaRossa, one of his counsel during

6. (Continued)
could be used against you in a court of law or otherwise in the future.

[At that point the witness nodded.]

Q. You also have the right to consult with an attorney. You understand that? A. Yes, sir.

Q. Do your have an attorney here today? A. No.

Q. Let me also advise you that you are a subject of the investigation of this grand jury. Do you understand that? A. Yes, sir.

Q. How long have you lived in Greenwich, Connecticut?

* * *"

Grand Jury warnings to Henry Fried:

" 'Q. Would you please state your full name? A. Henry Fried.

Q. Where do you reside? A. I have a city address at 301 East 66th Street, but I spent most of my time up at Somers, New York.

Q. Mr. Fried, are you the president of S. T. Grand & Company? A. I am; yes, sir.

Q. What is the nature of the S. T. Grand & Company's business? A. General Construction, pipe work; we're mostly water-main contractors, and occasionally, if my engineers see a job that they may be interested in, we bid on some structural work also.

Q. Let me advise you initially, Mr. Fried, that this Grand Jury is investigating alleged violations of the Federal Criminal Code, Section 371 and Section 1952, which in effect involves an alleged conspiracy to commit the state crime of bribery of a local official. And in connection with that, certain—use of certain interstate facilities used in connection with that crime; do you understand that, generally? A. I do, sir.

Q. I want to advise you that you have a right to consult an attorney; do you understand that? A. Yes, sir.

Q. Do you have an attorney who's sitting outside right now? A. I have, sir.

Q. What is his name? A. Mr. Cassese.

Q. How do you spell that name? A. I think it's Cassese. (spells)

Q. I want to advise you also that we're going to propound questions to you, and that you have a right to refuse to answer any questions which might be asked of you where you feel the answer to the question would tend to incriminate you personally; do you understand that? A. Yes, sir, I do.

the trial of this case. This affidavit was used in support of a motion on Motto's behalf to dismiss the indictment because, according to LaRossa's statements "on information and belief" D'Angelo was Motto's lawyer when they were summoned with the others to testify before the Grand Jury on December 18, 1967, and D'Angelo had failed to "advise Motto of his Constitutional rights with regard to testifying before the Grand Jury." We are at a loss to perceive the pertinency of this, in view of Motto's testimony before the Grand Jury that he had no lawyer.

The *Miranda* rule has no application to the circumstances of this case. It is hornbook law that witnesses called to testify before a Grand Jury have no right to the presence of a lawyer to object to questions or act as counsel. The practice of permitting counsel to sit in the anteroom to give advice if the witness so desired was followed here in the case of Fried, and Motto, as we have said, testified he had no lawyer and he made no request that he be given an opportunity to get a lawyer.

None of those summoned to appear were in custody nor were they put under any restraint. Moreover, the Grand Jury proceedings were conducted under the supervision of

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6. (Continued)

Q. In addition, any answer you do give may be used against you in a court of law in the future. You understand that? A. Yes, sir.

Q. I also want to advise you, Mr. Fried, that you are a possible subject of this investigation; do you understand that? A. Possible subject? I'd like you to explain that, sir, if you will.

Q. That means that the allegations are such that the Grand Jury is contemplating—or, are in the process of investigating an alleged bribery of which you may be a part; do you understand that? A. I understand that.

Q. That is as clear as I can make it. A. Right.

Q. Now, you state you are the president of S. T. Grand & Company?

* * *'"

a District Judge, who, it may be assumed, was at all times available for rulings on objections by any of the witnesses.

The plain truth of the matter is that the predicament of Fried and Motto was in no sense due to any deviation from duty by the prosecutor, but solely to the overconfidence and arrogance which led them to believe they could lie themselves out of trouble.

B.

We Find Nothing Improper or Prejudicial in Certain Comments by the Trial Judge.

During the cross-examination of Groopman counsel for Fried established the fact, which so far as we can see was never seriously questioned by any of the parties, that the City's engineers regarded Grand as the best qualified contractor to do the Jerome Park Reservoir job. Nevertheless, the documentary evidence made it quite clear that Marcus went to the very brink of awarding the contract to Oakhill, another contractor whose qualifications were also approved. With what seems to us to be undue liberality the trial judge permitted a lengthy and repetitious rehearsal of what a fine construction company Grand was. Finally, counsel for Fried produced a magazine article, not written by Groopman, and at first sought to read portions of the article into evidence, but finally he withdrew the exhibit. In the course of the ensuing colloquy, the trial judge said: "* * * under the terms of the indictment as cast, it wouldn't make very much difference whether one was more qualified than the other." Later, in other colloquies, this remark was repeated. Although the question was not raised by any proper motion or objection at the trial, we are asked to notice these comments as "plain error."

While the uncontradicted proof is that Grand was "fully qualified to perform this job," it was not and could

not reasonably be claimed by Fried and Grand that no other construction company was qualified or that the job had to go to Grand. Moreover, Marcus alone had the power to award the contract, and, but for Itkin's vigorous opposition and fear of the consequences, Marcus would have awarded the contract to Oakhill.

The comments by the trial judge were fully justified and bear not the slightest resemblance to the prejudicial comments discussed in the cases cited in the main brief of Fried and Grand.

C

In View of the Direct Examination of Fried and His Testimony on Cross-Examination by Counsel for Other Appellants to Which No Objection Was Raised on Fried's Behalf It Was Proper for the Trial Judge to Ask Fried Whether Prior to the Trial He Had Informed the Prosecutor That Part of His Testimony Before the Grand Jury Was False.

We have already discussed under the heading of Corallo's so-called Extortion Point the testimony of Fried, on direct examination, to the effect that D'Angelo and Pizza forced him to pay D'Angelo $40,000 by putting Fried in fear for his life. Later on, in his direct examination, Fried elaborated on this theme for the obvious purpose of explaining his reason for falsely stating to the Grand Jury that he had paid no money to anyone. Thus he said Joe Pizzo came up to him just before he entered the Grand Jury room and said:

> Commish, you are going into the grand jury room, and you want to make God damn sure you testify no money was passed or you are apt to find your body in an empty lot.

This was supposed to be Fried's reason for lying to the Grand Jury; and he said in effect that he had not intended to testify at the trial but changed his mind when the threat of physical injury to his person by Pizzo was removed by Pizzo's death in April, some little time before the trial commenced in June, 1968.

When cross-examined by Corallo's counsel, and without objection, Fried freely answered questions about why he had not reported the "extorsive" incident to his friend Garelik, a high ranking police official. He testified: "I did not because I was fearful of Joe Pizzo. I knew what it would mean if I did mention it."

At the close of the entire cross-examination, Judge Weinfeld interrogated Fried as follows:

> The Court: When did it come to your attention that Joe Pizzo died?
>
> The Witness: Some time in April.
>
> The Court: Of this year?
>
> The Witness: Of this year.
>
> The Court: That was about four months after you say you lied before the grand jury because of the threat?
>
> The Witness: That's right.
>
> The Court: After Joe Pizzo died, did you ever communicate with the United States Attorney and request that your grand jury testimony be changed to set forth the true version of what had occurred?
>
> The Witness: No, sir.
>
> The Court: After the death of Joe Pizzo, did you ever tell the United States Attorney that you had lied?

The Witness: I never did.

The Court: If there are no other questions, the witness may step down.

This testimony, given without objection, is claimed by Fried to be in violation of Fried's Fifth Amendment rights, despite the clear waiver of such rights by Fried's testimony on direct examination.

The alleged violation of Fried's Sixth Amendment rights is an equally frivolous contention. After Mr. Donati, Fried's counsel, had called a character witness, he decided to try to soften the effect of Fried's admission that, even after the threat of violence was removed by Pizzo's death, he had not informed the prosecutor that his Grand Jury testimony was false. And so he withdrew the character witness. In a conference at the bench Mr. Donati followed the propensity he had displayed on various occasions during the trial to make improper *ex parte* comments in lieu of testimony. So, Mr. Donati proceeded to tell Judge Weinfeld that "we," meaning himself and Fried, "had a decision to make * * * and that was a lawyer's decision" with more to the general effect that he and not Fried was responsible for the decision not to inform the prosecutor that Fried's testimony before the Grand Jury was false. And this in the face of previous testimony by Fried, to which his counsel made no objection, that he had made no effort to report the alleged extortion to the "authorities" and his attorneys had not suggested that this be done. Indeed, after this testimony had been given by Fried, Mr. Donati objected "to this whole line of testimony," and his objection was sustained, evidently upon the ground of the privileged relationship between attorney and client. Against this background, and without any motion, objection or effort to raise the question for appellate consideration, we

find there is no alleged Sixth Amendment violation before us for decision. Viewed from any angle the claim of deprivation of Fried's right to the effective assistance of counsel is wholly lacking in substance. Judge Weinfeld's questions constituted no more than a perfectly proper attempt to clarify testimony already given, without objection, by Fried.

The jury evidently found that Fried lied before the Grand Jury and that he also lied at the trial. It may well be that Pizzo's death gave Fried what may have seemed to him to be a good opportunity to invent a new version, bearing some slight resemblance to the facts as testified to by Marcus and Itkin. But it strains credulity to the breaking point to picture Fried and his lawyer seriously debating together the "legal" question of whether they should let the prosecutor know in advance of the trial that Fried was going to change his story.

Conclusion

We have carefully examined numerous additional claims made by one or another or all of the appellants concerning alleged erroneous and prejudicial rulings and we find no merit in any of them.

And so the sorry story of the corruption of a public official comes to a close. We see politicians hovering in the background, a labor leader as the master of ceremonies and underworld characters weaving a web of intrigue in the midst of secrecy and stealth. These sinister figures chisel in on one another in the fixing of their respective shares of the loot, and finally submit to the power of one who wanted his share "from off the top." This record reeks with proof of the guilt of every one of those whom the jury found guilty as charged.

Affirmed.

APPENDIX B.

Opinion of the District Court Dated March 13, 1968.

WYATT, District Judge.

On Motion to Transfer

This is a motion for defendant Antonio Corallo for an order transferring the proceeding as to him to another district. The motion is based on Rule 21(a) of the Federal Rules of Criminal Procedure which provides for such a transfer if the Court is satisfied that in this district there is "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" here. It is not suggested by Corallo to what district the case should be transferred, provided it is outside New York and Connecticut.

A similar motion to transfer has been made by defendants Fried and S. T. Grand, Inc., who suggest that the case be transferred to the Eastern District of Pennsyvania at Philadelphia. A similar motion to transfer has been made by defendant Motto who does not suggest to what district the case should be transferred, provided it is outside New York, Connecticut, and New Jersey.

The arguments and averments made by each defendant moving to transfer have been considered in connection with each motion.

It should be noted that defendants Itkin, Marcus, and Rappaport have not made motions to transfer and the case cannot be transferred as to them. This is not only because of the language of Rule 21(a) requiring that the transfer be "upon motion of the defendant" and that the transfer be "as to him"; it is also because of the Sixth

Amendment right of a defendant to a trial in the district "wherein the crime shall have been committed". Thus, if a motion to transfer be granted as to some defendants here, it may well be that at least two duplicating trials will be required. While this is no reason to deny a transfer if movants can receive a fair trial only in some other district, it is a factor to be kept in mind in reaching a decision on that point.

The movants have submitted numerous examples of the extensive newspaper publicity which followed the indictment and arrests of the defendants; it is stipulated that radio and television stations carried substantially the same news. It is beyond dispute that the publicity was on a very large scale. It would serve no useful purpose to describe what was published but some of it was plainly unfavorable to defendants, for example, the reference to a defendant as a "Mafia leader", the reference to another defendant as a "wartime racketeer", and the suggestions that the underworld was attempting to infiltrate the municipal government. Whatever the effect of this news coverage, there was no purpose to make difficult a fair jury trial for defendants. While the United States Attorney and an official of the Federal Bureau of Investigation appear to have made statements to the press, they did not stimulate or increase the publicity. The nature of the charges and the identity of the defendants would in any event have excited wide public interest, to which the news media responded naturally. It is assumed that the same factors will insure a continuing amount of publicity.

I am by no means satisfied, however, that the movants could not today obtain a fair and impartial trial in this Court House. Exposure to the most prejudicial type of publicity does not necessarily result in prejudiced jurors. The jury panels drawn in this Court have been, in my ex-

perience, remarkably free of bias and prejudice. This is a metropolitan community, sophisticated in the sense that excitement, and bizarre events are daily staples. The population is dense, with the supply of jurors virtually inexhaustible. The people of the District are of all types and backgrounds but they nevertheless live together in a high degree of harmony, occasional evidence to the contrary notwithstanding. They take seriously their responsibilities as jurors.

But the question is not whether today the movants could obtain a fair and impartial trial here in this City. No trial date has yet been fixed. It is too soon to decide whether the trial should be here or in some other District.

When the date for trial is reached, then the movants can ask for a transfer if they feel *at that time* that they cannot obtain here a fair and impartial trial. It is far better for the trial judge to decide such a motion in the light of the then situation than now to embark on the inconvenient and expensive course which a transfer would require. The trial judge can also take into account the cautionary controls available to him, such as those suggested (pp. 138-147) in "Standards Relating to Fair Trial and Free Press", a report of the American Bar Association Project on Minmium Standards for Criminal Justice.

If these motions to transfer are renewed at the opening of trial, the judge then presiding can choose whether to decide them before or after the voir dire examination of the jury panel to select a jury. It is noted that the report just cited recommends (pp. 119, 126, 127) that if the motion is *made* before the jury is selected it should be *decided* before the jury is selected; in other words, the ability to pick a jury which seems to meet minimum standards of impartiality should not prevent a transfer if "news coverage has raised substantial doubts about the effectiveness of the voir dire standing alone" (p. 127). It will be

time enough, however, to deal with these matters at the opening of trial.

The motion for defendant Corallo for an order transferring the proceeding as to him to another district is denied, without prejudice to its renewal at the opening of trial.

So ordered.

On Motion to Dismiss

This is a motion for defendant Corallo to dismiss the indictment; the motion is authorized by Rule 12(b)(1) of the Federal Rules of Criminal Procedure.

For the reasons given herein, the motion must be and is denied.

Defendants Fried and S. T. Grand, Inc. have also moved separately to dismiss the indictment for some of the reasons here advanced for movant Corallo. The arguments for dismissal made for Fried and S. T. Grand, Inc. have been considered in connection with this motion for Corallo.

The indictment was returned by a grand jury on December 18, 1967. It charges in one count that Corallo and others conspired to violate Section 1952 of Title 18 of the United States Code. There is a citation in the indictment to the conspiracy statute (18 U. S. C. § 371).

Section 1952 was enacted by Congress in 1961 as part of a program, submitted by then Attorney General Robert F. Kennedy, to combat organized crime. Section 1952 makes it an offense to travel in interstate or foreign commerce or to use any facility in that commerce with the intent of furthering an unlawful activity and if there is in fact a furthering of the unlawful activity or an attempt so to do. The definition of "unlawful activity" includes bribery in violation of state law.

The indictment charges that Corallo and others conspired together and that it was a part of this conspiracy that they would travel in interstate commerce and would use the telephone in interstate commerce with the object of bribing an official of the City of New York to award a municipal contract to one of the conspirators, the bribe moneys to be distributed to the city official and to others of the defendants.

It is first urged that Section 1952 is unconstitutional because it invades the powers reserved to the States by the Tenth Amendment. The argument is that the section is in aid of state law enforcement and is thus within the reserved police powers of the States. The argument is unsound because the section as here applied deals *only* with interstate commerce, over which Congress has undoubted power derived from the Constitution (Art. I, § 8). That Congress may adopt means to regulate interstate commerce even though such means "may have the quality of police regulations" (227 U.S. at 323, 33 S. Ct. at 284) is affirmed in decisions such as Champion v. Ames (the "lottery case"), 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903) and Hoke v. United States (a "white slave" case), 227 U. S. 308, 33 S. Ct. 281, 57 L. Ed. 523 (1913). In the one case Congress forbade the movement of lottery tickets in interstate commerce, in the other the movement of women and girls for immoral purposes. In each case, Congress acted to discourage behavior of which it disapproved but over which, within the states, it had no power. In each case, the decision was that the power of Congress over interstate commerce was properly exercised. It is difficult to see any distinction between the lottery case, the white slave case and the case at bar. In Section 1952, Congress has forbidden the use of interstate commerce to aid bribery and other activities illegal under state law;

that Congress would have no authority over such activities within the states is of no moment.

Cases cited for movant such as Linder v. United States, 268 U. S. 5, 45 S. Ct. 446, 69 L. Ed. 819 (1925) are not in point. *Linder* dealt with the indictment of a physician for violation of what is now 26 U. S. C. § 4705(a), part of the revenue laws as to narcotic drugs. This law made it an offense to "sell, barter, exchange, or give away" narcotics except under a written order on an official form. It was held to be no violation of the cited law for a physician in good faith to give an addict "moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction" (268 U. S. at 22, 45 S. Ct. at 450). The Court found that the law should not be interpreted as forbidding such conduct and that if it did forbid such conduct "it would certainly encounter grave constitutional difficulties" (268 U. S. at 22, 45 S. Ct. at 450), this because "direct control of medical practice in the states is beyond the power of the federal government" (268 U. S. at 18, 45 S. Ct. at 449). It should be noted that the practice of medicine is a lawful activity.

Nor is United States v. Constantine, 296 U. S. 287, 56 S. Ct. 223, 80 L. Ed. 233 (1935) in point. There Congress imposed an additional tax of $1000 per year on all those in the liquor business in violation of state law; the normal tax was from $25 to $100 depending on the type of liquor business. It was held that the purpose of Congress was not to tax but to impose "a penalty for the violation of State law" and that this was "a clear invasion of the police power, inherent in the states, reserved from the grant of powers to the federal government by the Constitution" (296 U. S. at 294, 295-96, 56 S. Ct. at 227). In the case at bar, however, it cannot be said that in enacting Section 1952 Congress was not regulating interstate com-

merce in the same way as in the lottery and white slave cases. Moreover, the Authority of *Constantine* is seriously weakened by the fact that Brandeis, Stone and Cardozo, JJ. were in dissent, insisting that for Congress to classify an illegal business for tax purposes in a different way than a legal business is not to punish "for a crime against another [a state] government" (296 U. S. at 298, 56 S. Ct. at 228).

It is contended that Section 1952 violates constitutional rights to travel, to speak, etc. The answer is that the statute interferes only with travel and speech in aid of *unlawful* activities and not at all with travel and speech for legitimate purposes. Movant is in error in claiming that the statute forbids travel merely because a person may have a particular intent; there is no violation of Section 1952 unless an act is performed, or attempted to be performed, in aid of an unlawful activity.

The other arguments directed to the constitutionality of Section 1952 have been considered and found without merit.

The conclusion that Section 1952 violates no constitutional provisions is in accord with a number of reported decisions. Among these are United States v. Barrow, 363 F. 2d 62 (3d Cir. 1966), cert. denied 385 U. S. 1001, 87 S. Ct. 703, 17 L. Ed. 2d 541 (1967); United States v. Zizzo, 338 F. 2d 577 (7th Cir. 1964), cert. denied 381 U. S. 915, 85 S. Ct. 1530, 14 L. Ed. 2d 435 (1965); Turf Center, Inc. v. United States, 325 F. 2d 793 (9th Cir. 1963); Bass v. United States, 324 F. 2d 168 (8th Cir. 1963). No decision has been cited, and none has been found, to the contrary.

Other arguments are made for dismissal on the ground that the indictment fails to charge an offense.

Among other things, the principle is invoked that the giver and the receiver of a bribe cannot be prosecuted for a conspiracy because the crime of bribery requires the par-

ticipation of two parties. See United States v. Zeuli, 137 F. 2d 845 (2d Cir. 1943). But this indictment does not charge a conspiracy to commit bribery but rather a conspiracy to violate Section 1952 in that, as part of the conspiracy, the alleged conspirators would travel and would use a facility of interstate commerce in furtherance of the bribe. There is an essential element of the offense here charged which would not be required in a charge of conspiracy to bribe, namely, the travel in interstate commerce or the use of a facility in interstate commerce to aid the unlawful activity.

The principle invoked for movant could not in any event be applicable to the indictment at bar.

The "unlawful activity" charged as the object of the conspiracy is the violation of Sections 372, 378 and 1826 of the New York Penal Law, McKinney's Consol. Laws, c. 40, as in effect prior to September 1, 1967.

Section 372 of the Penal Law ("officer accepting bribe") made it an offense for a "public officer" to ask or to receive anything to influence any official act or duty.

Section 378 of the Penal Law ("Bribing certain public officers") made it an offense for any person to offer or to give anything to any "public officer" to influence his official act or duty.

Section 1826 of the Penal Law ("Taking unlawful fees") made it an offense for any "public officer" to ask or to receive anything, other than as authorized by law, for any official act or duty.

It is doubtful if the cooperation of two persons is necessary for a violation of the cited Sections. For present purposes, however, it will be assumed that there must in each instance be a giver and a taker.

The conspiracy averred in this indictment included many persons who were to be neither givers nor takers. The only "public officer" among the alleged conspirators

was Marcus, a city official; he could be the only taker of moneys in violation of Sections 372 and 1826 and could not himself violate Section 378 which applied only to the giver. The only givers alleged among the conspirators were to be Fried and S. T. Grand, Inc. But the conspiracy is alleged to have included persons who were neither givers nor takers; Itkin, Motto, Rappaport and the movant Corallo; their parts are not specified in detail but it is clear that they were to unite their efforts to accomplish the unlawful object. This is a classic charge of conspiracy, in no way affected by any cases cited to show it as defective.

Because the conspiracy included persons whose participation was not essential to the offense of bribery, the principle of such cases as United States v. Sager, 49 F. 2d 725, 727-729 (2d Cir. 1931) does not apply. "The principle is * * * limited to cases where the essential participants are the only conspirators. When those whose co-operation is necessary for the commission of the substantive crime conspire with another person to commit the offense, all are guilty of conspiracy." 1 Wharton's Criminal Law and Procedure (1957 ed.) 193.

As an example very similar to the case at bar, some thieves sold stolen merchandise with the services of a go-between, who received a commission. The thieves, the buyer and the go-between were indicted for conspiracy. The same argument was made as here, based on the Zeuli decision (above cited). Our Court of Appeals described Zeuli as having held that "neither the buyer of stolen goods nor the thief may be convicted of conspiring with each other to receive them". The Court then distinguished this situation from a stolen goods conspiracy which included a go-between. The Court said: "While the crime of receiving and possessing stolen goods necessarily involves the cooperation of the thief and the buyer, it does not necessarily in-

volve the cooperation of the buyer and a go between * * *. That distinguishes United States v. Zeuli, supra, from this case." United States v. Smolin, 182 F. 2d 782, 786 (2d Cir. 1950).

As another example, perhaps even closer to the case at bar, see the discussion by Judge Cooper in United States v. Cogan, 266 F. Supp. 374, 377-378 (S. D. N. Y. 1967). There is also a good discussion by Judge Dobie in Old Monastery Co. v. United States, 147 F. 2d 905, 907-908 (4th Cir.), cert. denied 326 U. S. 734, 66 S. Ct. 44, 90 L. Ed. 437 (1945). See also United States v. Holte, 236 U. S. 140, 35 S. Ct. 271, 59 L. Ed. 504 (1915); Reno v. United States, 317 F. 2d 499, 503-504 (5th Cir. 1963).

That Corallo and other defendants may have been called as witnesses before the grand jury is no reason for dismissing the indictment against him or them. United States v. Winter, 348 F. 2d 204, 207-208 (2d Cir.), cert. denied 382 U. S. 955, 86 S. Ct. 429, 15 L. Ed. 2d 360 (1965).

The motion of defendant Corallo to dismiss the indictment is denied.

So ordered.

On Motion to Suppress

This is a motion for defendants Fried and S. T. Grand, Inc. for an order suppressing for use as evidence the grand jury testimony of Fried and dismissing the indictment as against these defendants. Presumably the motion is believed authorized by Fed. R. Crim. P. 12(b)(1) and 41(e).

The ground for the motion is that, according to Fried, he was summoned to appear before the grand jury and did appear at about 10:30 A. M. on Monday, December 18, 1967; that after he left the grand jury room he was followed by government agents and was arrested at about 1:30 P. M. on the same day.

I have read the testimony of Fried before the grand jury. He was advised of the alleged violations which were being investigated, that he was a "possible subject of this investigation", and that the grand jury was investigating "an alleged bribery of which you may be a part". He was told of his privilege against self-incrimination. He was told that he had a right to consult counsel and in this connection Fried stated that his attorney was then sitting just outside the grand jury room. It is appropriate to this extent to invade the required secrecy of grand jury proceedings in order to give the background against which the present motion is made.

The indictment was handed up on December 18, 1967, and a bench warrant was issued for the arrest of Fried. The return of the warrant was filed December 26, 1967, and shows that it was received and executed on December 18, 1967. Whether the officer executing the warrant had it in his possession at the time of the arrest is of no moment. Fed. R. Crim. P. 9(c)(1) and 4(c)(3).

The argument for the present motion is that Fried and his corporation were "de facto defendants" (Moving memorandum, p. 4) when he was questioned before the grand jury. In this connection, counsel for movants refer to the return of the indictment shortly after Fried testified; it is asserted that the return was a "mere formality" (Moving memorandum, p. 4). It is suggested that the grand jury "might" have voted an indictment even before Fried was questioned.

There is a strong presumption in favor of the regularity of grand jury proceedings and the suggestion cannot be accepted that this indictment was voted before the testimony of Fried but was not returned until after his testimony.

The argument for movants invokes Miranda v. State of Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694

(1966) to require that a witness before a grand jury, who is himself the subject of investigation, must be allowed to have counsel present with him before the grand jury. Since counsel was not present with Fried in the grand jury room, his constitutional rights were violated, and the indictment must be dismissed. This Court declines so to extend Miranda v. Arizona.

Preliminarily it may be noted that the motion is made on behalf of the corporation, S. T. Grand, Inc., of which Fried is president. It is difficult to see how the corporation has any standing to move to suppress because constitutional rights of Fried were violated. A corporation in any event has no privilege against self-incrimination under the Fifth Amendment (United States v. White, 322 U. S. 694, 699, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944)) and since the chief, if not only, function of counsel in the grand jury room would be to advise as to incriminating questions, no rights of the corporation to counsel could possibly have been affected here.

Preliminarily also, Fried himself has no standing to make the present motion because he never asked to have counsel present with him in the grand jury room. He was told that he had a right to consult counsel. He had a lawyer sitting just outside. He is not within the principle of Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964) nor of Miranda v. State of Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The application of *Escobedo* depends on whether "the suspect *has requested* and been denied an opportunity to consult with his lawyer" (378 U. S. at 491, 84 S. Ct. at 1765; emphasis supplied). The statement in *Miranda* is that "the Fifth Amendment privilege comprehends * * * a right * * * to have counsel present during any questioning *if the defendant so desires*" (384 U. S. at 470, 86 S. Ct. at

1626). Fried never "requested" that his counsel come into the grand jury room nor indicated in any way that he so desired.

Even if Fried had requested that his counsel be permitted to come into the room, the result would be the same. Rule 6(d) of the Federal Rules of Criminal Procedure specifies the persons authorized to be present while the grand jury is in session; an attorney for "the witness under examination" is not among those specified. Traditionally, witnesses before grand juries have not been permitted to have their attorneys inside the grand jury room and there is impressive authority that this violates no constitutional rights of the witness. "A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel * * *". In re Groban, 352 U. S. 330, 333, 77 S. Ct. 510, 513, 1 L. Ed. 2d 376 (1957). Counsel for movants point out that this was a five to four decision (Reply memorandum, p. 8) but, as to the principle that there is no right to the presence of counsel in the grand jury room, there was no difference between the majority and dissenters, as shown by the dissenting opinion of Mr. Justice Black (see discussion, 352 U. S. 346-347, 77 S. Ct. 510, 1 L. Ed. 2d 376). The present argument for movants was carefully considered and rejected by Judge Weinfeld in United States v. Kane, 243 F. Supp. 746, 753-754 (S. D. N. Y. 1965). See also Directory Services, Inc. v. United States, 353 F. 2d 299, 301 (8th Cir. 1965).

The motion of defendants Fried and S. T. Grand, Inc., to dismiss the indictment is denied.

So ordered.

APPENDIX C.

32686-9

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

ANTONIO CORALLO, HENRY FRIED, DANIEL J. MOTTO AND S. T. GRAND, INC.,
Defendants-Appellants,

HERBERT ITKIN, JAMES L. MARCUS AND CHARLES J. RAPPAPORT,
Defendants,

(and 3 other cases).

A petition for a rehearing having been filed herein by counsel for appellant Antonio Corallo,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ HAROLD R. MEDINA,
/s/ STERRY R. WATERMAN,
/s/ IRVING R. KAUFMAN,
Circuit Judges.

August 21, 1969.

APPENDIX D.

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of July, one thousand nine hundred and sixty-nine

Present: HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
HON. IRVING R. KAUFMAN
Circuit Judges

UNITED STATES OF AMERICA,
Appellee

v.

ANTONIO CORALLO, HENRY FRIED, DANIEL J. MOTTO AND S. T. GRAND, INC.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX E.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 68, CIV. 3931.

PEOPLE OF THE STATE OF NEW YORK

against

HERBERT ITKIN,

Defendant.

Petition for Removal.

(Filed October 4, 1968.)

To the Judges of the United States District Court for the Southern District of New York:

The petition of HERBERT ITKIN respectfully shows:

1. On the 14th day of April 1967 an indictment was filed against petitioner in the Supreme Court of the State of New York in and for the County of New York, entitled: *"The People of the State of New York v. Herbert Itkin, Defendant,"* Indictment No. 1589/67, a copy of which is annexed hereto and marked Exhibit A. On April 20, 1967 petitioner appeared before the Supreme Court, County of New York, and pleaded Not Guilty to said indictment and was released on his own recognizance. Said indictment charges petitioner with the theft of certain monies from

one Bernard W. Robbins and the Robbins Investment Company, Inc. between the dates of September 24, 1964 and January 21, 1965. Said indictment contains 11 counts: 8 counts charging Grand Larceny, First Degree; 2 counts charging Grand Larceny, Second Degree; and 1 count charging Petit Larceny.

2. Subsequent to the filing of Indictment No. 1589/67, petitioner filed a notice of motion for an order, pursuant to Section 813-C, *et seq.* of the Code of Criminal Procedure, declaring illegal and void a search made of his law offices at 103 Park Avenue, City, County and State of New York. Said motion was denied. Therefore, petitioner filed a motion for reargument which was granted on August 16, 1967 by the Hon. Mitchell D. Schweitzer, who ordered ". . . that a hearing be held before the Trial Court on the issues raised on the motion to suppress evidence."

3. On January 9, 1968 the District Attorney for the County of New York added Indictment No. 1589/67 to the trial calendar in the Supreme Court, New York County. Thereafter, the trial of the action was adjourned on several occasions and on September 18, 1968 the Hon. Abraham J. Gellinoff fixed the date of October 15, 1968 as the date upon which the actual trial is to commence. No further proceedings have been had therein.

4. On June 26, 1968 an indictment was filed against petitioner in the Supreme Court of the State of New York in and for the County of New York, entitled: *"The People of the State of New York v. Herbert Itkin, Defendant,"* Indictment No. 2842/68, a copy of which is annexed hereto and marked Exhibit B. Petitioner appeared before the Court on said date and pleaded not guilty to the charges in the indictment. Said indictment charges the petitioner

with conspiracy in the Third Degree in that he was alleged to have conspired on or about December 15, 1967 with James L. Marcus and Charles Rappaport in contemplation of their appearance before the Fourth Grand Jury of the County of New York for the December, 1967 Term to commit the crime of perjury in the First Degree.

5. Indictment No. 2842/68 was added to the trial calendar on September 26, 1968 and the Hon. Mitchell D. Schweitzer fixed the date of October 14, 1968 as the date upon which trial is to commence. No further proceedings have been had therein.

6. On June 26, 1968 an indictment was filed against petitioner in the Supreme Court of the State of New York in and for the County of New York entitled: "*The People of the State of New York v. Herbert Itkin and James L. Marcus, Defendants,*" Indictment No. 2843/1968, a copy of which is annexed hereto and marked Exhibit C. Petitioner appeared before the Court on said date and pleaded not guilty to the charges in the indictment. Said indictment charges petitioner and James L. Marcus from on or about April 4, 1966 to on or about December 4, 1967 in 10 counts with violations of Sections 580, 1826 and 378 of the Penal Law of the State of New York, namely conspiracy, the taking of unlawful fees by a public official and the receiving of bribes.

7. Indictment No. 2843/1968 was added to the trial calendar in the Supreme Court of the State of New York, County of New York, by the District Attorney of New York County on September 26, 1968. At that time the District Attorney, New York County, served a notice upon petitioner, dated September 26, 1968, that during the trial of said action, the People expect to adduce evidence of a

statement by the defendant bearing on the issue of his guilt. The Hon. Mitchell D. Schweitzer fixed the date of October 14, 1968 as the date upon which the trial of said action is to commence. No further proceedings have been had therein.

8. The three above-described criminal actions against petitioner are matters which properly may be removed to this Court by petitioner, defendant therein, pursuant to the provisions of Title 28, United States Code, Section 1442(a)(1) in that the said indictments allege certain facts which occurred during specified periods of time and at all times referred to in said indictments petitioner was an "informer" for the Federal Bureau of Investigation, an agency of the United States Government. Further, during the periods of time specified in the said indictments, petitioner was acting under color of his said office and in the performance of the duties of said office in that he was performing duties incidental to his mission of penetrating organized crime and acts performed by petitioner in connection with the matters set forth in said three indictments were committed by him under color of his said office and in the performance of his duties.

9. This petition is timely filed in that Title 28, United States Code, Section 1446(c) provides that the petition for removal of a criminal prosecution may be filed at any time before trial.

10. Petitioner is not required to file herewith a bond nor any surety for in each of the three pending criminal actions in the Supreme Court of the State of New York, County of New York, the District Attorney of New York County consented to the defendant being released in his own recognizance. Further, petitioner is presently in the

custody of the United States Marshal for the Southern District of New York.

WHEREOF, petitioner prays that the above-entitled actions now pending against him in the Supreme Court of the State of New York in and for the County of New York be removed therefrom to this Court.

PHILIP J. RYAN,
Philip J. Ryan,
Office and P. O. Address,
660 Madison Avenue,
New York, N. Y. 10021,
Attorney for Petitioner.

STATE OF NEW YORK
COUNTY OF NEW YORK } *ss.:*
SOUTHERN DISTRICT OF NEW YORK

Philip J. Ryan, being duly sworn, deposes and says that his office and post office address is 660 Madison Avenue, New York, New York; that he is the attorney for the petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same are true, based on his conversations with petitioner; and the ground that this petition is not signed by the petitioner herein is that he is unavailable for he is in the custody of the United States Marshal for the Southern District of New York.

PHILIP J. RYAN,
Philip J. Ryan,
Office and P. O. Address,
660 Madison Avenue,
New York, N. Y. 10021,
Attorney for Petitioner.

Sworn to before me this 3rd day of October, 1968.

BURTON L. KNAPP,
Notary Public.

BURTON L. KNAPP
Notary Public, State of New York
No. 31-2152725
Qualified in New York County
Commission Expires March 30, 1969.

APPENDIX F.

Statutes Involved.

1. FEDERAL STATUTES.

Sec. 1952. *Interstate and foreign travel or transportation in aid of racketeering enterprises.*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

2. Old New York Penal Law.

(in force up to September 1, 1967, applicable here.)

Sec. 372. Officer accepting bribe.

A judicial officer, a person who executes any of the functions of a public officer, or a person elected or appointed a judicial officer or to execute any of the functions of a public officer and not designated in articles one hundred and seventy-four and one hundred and seventy and in section twenty-three hundred and twenty of this chapter, or a person employed by or acting for the state, or for any public officer in the business of the state, or elected or appointed to become so employed or act, who asks, receives, or agrees to receive a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, upon any agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding, shall be influenced thereby, or that he will do or omit any act or proceeding, or in any way neglect or violate any official duty, is punishable by imprisonment for not more than ten years, or a fine of not more than five thousand dollars, or by both. A conviction also forfeits any office held by the offender, and forever disqualifies him from holding any public office under the state.

* * *

Sec. 378. Bribing certain public officers.

A person who gives or offers, or causes to be given or offered, a bribe, or any money, property, or value of any kind, or any promise or agreement therefor, to a public

officer, or to a person executing any of the functions of a public office, or to a person elected, appointed or designated to thereafter execute the same, other than one of the officers or persons designated in articles one hundred and twenty-four, one hundred and seventy, or in sections three hundred and seventy-one and twenty-three hundred and twenty of this chapter, with intent to influence him in respect to any act, decision, vote, opinion or other proceeding, in the exercise of the powers or functions which he had or may have, is punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or by both.

* * *

Sec. 850. Extortion defined.

Extortion is the obtaining of property from another, or obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right.

* * *

Sec. 855. Public officer taking illegal fees commits extortion.

A public officer who asks, or receives, or agrees to receive, a fee or other compensation for his official service:

1. In excess of the fee or compensation allowed to him by statute therefore; or,

2. Where no fee or compensation is allowed to him by statute therefor,

Commits extortion and is guilty of a misdemeanor.

* * *

Sec. 1826. Taking unlawful fees.

A public officer or a deputy, clerk, assistant or other subordinate of a public officer, or any person appointed or employed by or in the office of a public officer, who shall, in any manner act for or in behalf of any such officer, who asks or receives, or consents or agrees to receive, any emolument, gratuity or reward, or any promise of emolument, gratuity or reward, or any money, property or thing of value or of personal advantage, except such as may be authorized by law, for doing or omitting to do any official act, or for performing or omitting to perform, or for having performed or omitted to perform any act whatsoever directly or indirectly related to any matter in respect to which any duty or discretion is by or in pursuance of law imposed upon or vested in him or may be exercised by him by virtue of his office, or appointment or employment or his actual relation to the matter, shall be guilty of a felony, punishable by imprisonment for not more than ten years or by a fine of not more than four thousand dollars, or both.

3. Code of Criminal Procedure.

(Book 66, Part 2.)

Sec. 399. Conviction cannot be on testimony of accomplice, unless corroborated.

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 620

HENRY FRIED and S. T. GRAND, INC.,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR KARGER,
Counsel for Petitioner,
600 Madison Avenue,
New York, N. Y. 10022.

ALFRED DONATI, JR.,
Of Counsel.

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Rulings of District Court and Decision of Court of Appeals	13
REASONS FOR GRANTING THE WRIT	
1. As to whether the hearsay declarations of alleged co-conspirators could properly serve to supply the requisite evidence against petitioners of the essential, jurisdictional element of knowledge or reasonable contemplation on their part of the use of interstate telephone communications, as held by the Court of Appeals below	14
2. As to the Fifth and Sixth Amendment rights of a target of a Federal grand jury investigation who is subpoenaed before the grand jury	22
3. As to the effect of Itkin's role as an undercover Government informer as precluding his being considered a co-conspirator for the purposes of the co-conspirator exception to the hearsay rule	25
4. As to the permissible scope of the cross-examination of a defendant's character witness	28
CONCLUSION	29
APPENDIX A—Opinion of United States Court of Appeals	1a

PAGE

APPENDIX B—Opinion of United States District Court 64a

APPENDIX C—Judgment of United States Court of Appeals 68a

Order Denying Petition for Rehearing 70a

APPENDIX D—Constitutional and Statutory Provisions Involved 71a

AUTHORITIES CITED

Cases

Bruton v. United States, 391 U.S. 123 29

Carbo v. United States, 314 F.2d 718 (9th Cir.), cert. den. sub nom. Palermo v. United States, 377 U.S. 953 20

Escobedo v. Illinois, 378 U.S. 478 ..... 22, 25

Ferina v. United States, 302 F.2d 95 (8th Cir.), cert. den. sub nom. Cardarella v. United States, 371 U.S. 819 17

Glasser v. United States, 315 U.S. 60 ..... 17, 19

Harlow v. United States, 301 F.2d 361 (5th Cir.), cert. den. 371 U.S. 814 17

In Re Groban, 352 U.S. 330 25

Ingram v. United States, 360 U.S. 672 ..... 15, 16, 21, 22

Jones v. United States, 342 F.2d 863 (D.C. Cir.) 24

Krulewitch v. United States, 336 U.S. 440 25

Massiah v. United States, 377 U.S. 201 22

Michelson v. United States, 335 U.S. 469 ..... 28, 29

Miranda v. Arizona, 384 U.S. 436 ..... 22, 23, 24, 25

Sears v. United States, 343 F.2d 139 (5th Cir.) 27

Stirone v. United States, 361 U.S. 212 15

PAGE

Tripp v. United States, 295 F.2d 418 (10th Cir.) 17
Twitchell v. United States, 313 F.2d 425 (9th Cir.), vacated and remanded in other respects, sub nom. Rogers v. United States, 376 U.S. 188 .....15, 16, 17, 21

United States v. Barnes, 383 F. 2d 287 (6th Cir.), cert. den., 389 U.S. 1040 ..... 15, 21
United States v. Beno, 324 F.2d 582 (2d Cir.), cert. den. 379 U.S. 880 29
United States v. Bentvena, 319 F.2d 916 (2nd Cir.), cert. den. 375 U.S. 940 17
United States v. Chase, 372 F.2d 453 (4th Cir.) 27
United States v. Costello, 352 F.2d 848 (2d Cir.), rev'd on other grounds sub nom. Marchetti v. United States, 390 U.S. 39 ..... 19, 27
United States v. Crimmins, 123 F.2d 271 (2d Cir.) 15, 16, 19, 21
United States v. Dennis, 183 F.2d 201 (2d Cir.), aff'd 341 U.S. 494 20
United States v. Giddins, 273 F.2d 843 (2d Cir.), cert. den. 362 U.S. 971 29
United States v. Halpin, 374 F.2d 493 (7th Cir.), cert. den. 386 U.S. 1032 20
United States v. Hawthorne, 356 F.2d 740 (4th Cir.) 15
United States v. Morello, 250 F.2d 631 (2d Cir.) 27
United States v. Ragland, 375 F.2d 471 (2d Cir.), cert. den. 390 U.S. 925 19

Wong Sun v. United States, 371 U.S. 471 25

United States Constitution

Fifth Amendment 2, 22, 23, 24, 71a
Sixth Amendment 2, 22, 23, 24, 71a

Statutes

PAGE

18 U.S.C. § 371 ..... 3, 72a
18 U.S.C. § 1952 ..... 1, 3, 4, 14, 15, 71a

Miscellaneous

Meshbesher, "Right to Counsel Before Grand Jury," 41 F.R.D. 189 ..... 23, 24, 25
"The Supreme Court, 1963 Term," 78 Harv. L. Rev. 143 24

IN THE

Supreme Court of the United States

October Term, 1969

No.

HENRY FRIED and S. T. GRAND, INC.,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Henry Fried and S. T. Grand, Inc. (hereinafter referred to as "Grand"), pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered on July 8, 1969, which affirmed judgments of the United States District Court for the Southern District of New York, entered on a jury verdict, convicting petitioners and two co-defendants, Antonio Corallo and Daniel J. Motto, under an indictment charging them with conspiracy to violate 18 U.S.C. § 1952 by using the interstate telephone with intent to promote the commission of the New York State crime of bribery.

Opinion Below

The opinion of the Court of Appeals is not yet reported, but is printed in Appendix A, *infra,* pp. 1a-63a). The opinion rendered by the District Court on one of the issues here presented is reported in 281 F. Supp. 24, 30-31, and is printed in Appendix B, *infra,* pp. 64a-67a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 8, 1969 (Appendix C, *infra,* p. 68a). A timely peti-

tion for rehearing filed by petitioners, was denied by that Court on August 21, 1969 (Appendix C, *infra*, p. 70a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where a defendant has been indicted on the charge of conspiring with others to violate 18 U.S.C. § 1952 by using the telephone interstate with intent to promote the commission of the New York State crime of bribery:

(a) Is the question whether there is legally sufficient evidence against such defendant as to each essential element of the crime charged, to warrant submission of the case against him to the jury, to be determined solely on the basis of the independent proof of his own words and acts, without regard to the hearsay declarations of alleged co-conspirators?

(b) Is such defendant entitled to a judgment of acquittal as a matter of law, for failure of proof of an essential, jurisdictional element of the crime charged, where there is an absence of any independent evidence of his own words and acts to show that he knew or had reason to expect that the interstate telephone was or would be used or caused to be used in furtherance of the alleged conspiracy, and that he agreed to the use of the same?

2. Is it violative of the Fifth and Sixth Amendment rights of an individual who is a target of a pending Federal grand jury investigation, for the Government to compel such individual, pursuant to subpoena, to submit to secret interrogation before the grand jury, without the presence of counsel at such interrogation?

3. Where it is undisputed that a named defendant in a Federal conspiracy prosecution, as to whom the indictment was severed on motion of the Government, had throughout the period involved in such case and for a number of years prior thereto, been making regular reports to the F.B.I. in other matters as an undercover Government informer, pursuant to a general assignment from

the F.B.I. to infiltrate organized crime, that he assumed the guise of a co-conspirator in this case pursuant to such assignment and his purpose throughout was to gather evidence for Government prosecution of the other defendants, that he withheld the details of such case from the F.B.I. until after consummation of the conspiracy in order to preserve his "cover", and that the Government had agreed to recommend that the indictment against him be *nolle prossed,* was it error for the Court of Appeals to hold that there was no evidentiary basis for the objection that such a Government informer could not be considered a co-conspirator for the purposes of the co-conspirator exception to the hearsay rule?

4. Is prejudicial error committed in the trial of a Federal criminal case, where the trial court permits the Government attorney, over objection, to cross-examine a defendant's character witness as to whether such witness has heard of the defendant's commission of other alleged criminal activities, where such alleged activities are of a secret, unpublicized nature and not likely to have been the subject of comment in the community?

Constitutional and Statutory Provisions Involved

The constitutional provisions here involved are the Fifth and Sixth Amendments to the United States Constitution. The statutes here involved are 18 U.S.C. § 1952 and 18 U.S.C. § 371. The pertinent portions thereof are set forth in Appendix D, *infra,* pp. 71a, 72a.

Statement of the Case

The one count indictment in this case charged seven defendants, including petitioners, and others with the crime of conspiracy to violate 18 U.S.C. § 1952 by traveling in interstate commerce and using and causing to be used "a facility in interstate commerce, to wit, the telephone, between New York, New York, and Greenwich, Connecticut, with intent to promote . . . and facilitate the promotion" of the "unlawful activity" of bribery of a public official

in violation of the Penal Law of the State of New York (22a-23a).[1] However, notwithstanding the reference in the indictment to interstate travel, the case was submitted by the District Court to the jury, and the convictions were affirmed by the Court of Appeals, solely on the theory of a conspiracy to use the interstate telephone in violation of 18 U.S.C. § 1952 (1221a-1222a; App. A, *infra*, p. 2a).

The public official involved was defendant James L. Marcus, formerly in charge of New York City's Department of Water Supply, Gas and Electricity, and the alleged bribe, consisting of a 5% kickback amounting to $40,000, was charged to have been agreed upon by the defendants and paid by petitioners Fried and Grand as the condition for the award by Marcus to Grand (of which Fried was president) on November 23, 1966 of an emergency contract for the cleaning and repair of the Jerome Park Reservoir in Bronx County, New York. The indictment alleged that it was part of the conspiracy that the defendants *other than petitioners Fried and Grand* "would and did make and receive and cause to be made and received telephone calls between New York, New York, and Greenwich, Connecticut" concerning the alleged bribe agreement and the payment and distribution of monies pursuant thereto (24a-25a).

Defendant Marcus pleaded guilty. The case was also severed, on motion of the Government, as against another defendant, Herbert Itkin, an attorney associated with Marcus in certain business ventures, who, as hereinafter more fully shown (*infra*, pp. 26-27), had been engaged in infiltrating organized crime as a secret informer for the F.B.I. since 1962 and, according to his testimony, engaged in the alleged conspiracy with the intent to gather and turn over to the F.B.I. evidence for Government prosecution of the other defendants.

In early 1966, the New York City Water Department's engineers determined that it was necessary to clean and

---

[1] Unless otherwise indicated, figures in parentheses followed by the letter "a" refer to the pages of Appellants' Appendix in the Court of Appeals, a certified copy of which has been filed with this petition.

repair the Jerome Park Reservoir because of a heavy accumulation of sludge, and they recommended that the job be awarded to a qualified contractor as an emergency contract, without public bidding, on a cost plus basis, because the scope of the work was not fully determinable, and because of the time factor involved in having the work done as quickly as possible (145a-148a).

The Government's own evidence showed that following meetings which they initiated with a representative of Grand, Sidney Rosenwasser, the City's engineers independently recommended to Marcus in October 1966 that Grand would be the best contractor to do the work, based on its past performance and reputation, and its having the necessary equipment and manpower to meet the time schedule for completing the work (149a-150a, 170a-172a, 182a-184a, 369a). But Marcus said that he would think about it and instructed the Chief Engineer, Groopman, to interview other contractors (150a).

Interviews followed of two other contractors. The first was the so-called Orlando-Daril group, a joint venture which included one Orlando, who had engaged in prior bribe deals with Marcus through Itkin (150a, 173a, 333a-334a, 365a, 650a). The City engineers found that group unqualified (151a). The next contractor was Oakhill Construction Co., with which Marcus had made a substantial bribe arrangement through a Republican party official named Ruggiero (232a-233a). Oakhill was found qualified (152a), and on November 18, 1966, Marcus instructed Groopman to prepare the necessary papers for the award of the reservoir contract to Oakhill, which Groopman did (152a-154a). On November 23, 1966, however, Marcus told Groopman "that he had changed his mind, that he was going to award the contract to S. T. Grand, and * * * that he would feel easier because S. T. Grand is a very large company with a great deal of equipment" (154a), and new papers were thereupon prepared for the award of the contract to Grand (154a-157a).

The Government's case against petitioners Fried and Grand was for the most part based on testimony by Itkin

and Marcus as to declarations allegedly made, out of Fried's presence, by defendants Motto and Corallo and by another alleged co-conspirator, one Joseph Pizzo, who handled labor relations for several of Fried's companies as well as other contractors in the construction field. As the District Court stated in its charge to the jury (1238a), *"up to July 1967, there is no direct evidence that any of the parties talked directly to Henry Fried or his brother on the subject of a kickback. The testimony all relates to what was reported to and by the alleged co-conspirators".*[2]

Itkin testified that Motto approached him late in May 1966 on a proposition for a kickback arrangement in connection with the award of the Jerome Park Reservoir contract, and that he spoke to Marcus about Motto's proposal (484a-485a). According to Itkin and Marcus, however, this was too large a contract for Motto to handle, and Motto introduced Itkin to Corallo as someone "higher up", and Corallo told Itkin that they were going to have Pizzo attempt to negotiate a kickback arrangement with Fried (485a-487a). Marcus and Itkin decided to ask for a 7½% kickback for themselves, which they estimated would amount to $75,000 (488a). According to Itkin, he thereafter had meetings with Motto and Corallo in September 1966, at which he was informed that they had decided to ask for a 15% kickback, which would include 7½% for themselves, and he was told by them that 15% was "too much for Henry Fried to pay" and that they "can't get this amount" (491a). They suggested that Marcus consider reducing his figure (491a), and Marcus then agreed to a reduction to 5% (213a-216a, 492a-494a).

Itkin testified that on September 28, Corallo told him that "the deal is dead" and that "Joe Pizzo had met with Henry Fried and his brother and they just said no to the 10 percent, they weren't going to pay that much" (495a, 642a). Itkin then suggested to Corallo that they let Motto handle the deal, since Motto had previously told Itkin that

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[2] Emphasis throughout this petition is supplied, unless otherwise indicated.

he could do better than Pizzo through his friend, Carl D'Angelo, an attorney who did legal work for several of Fried's companies (495a, 489a, 963a, 992a, 1103a). According to Itkin, he and Corallo met with Motto a few days later and Motto said he felt he could make the deal but at no more than 5% (496a). Marcus thereafter agreed to reduce his percentage to 3% (496a). Itkin further testified that he met Motto some time in the middle of October and that Motto told him "It's a deal, we got it for 5 per cent", and they would get the money "all at once" (498a).

Marcus testified that he made the switch on November 23, 1966 from Oakhill to Grand, because Itkin contacted him and told him that Corallo and Motto would kill them if he gave the contract to Oakhill (233a). After the award of the contract to Grand, some time went by without any payment, and Motto then purportedly told Itkin and Marcus that Fried would not make any payment until he could estimate the amount of the contract price and that he would then make a partial payment of one-fourth of the estimated 5% kickback (507a-508a). Itkin testified as to the difficulties thereafter allegedly encountered by Motto in securing payments from Fried (509a, 515a-517a). Itkin also testified as to Motto's picking up payments from D'Angelo (517a, 669a), and as to a dispute between Motto and the others in the spring of 1967 as to whether Fried had paid a total of $40,000 or only $30,000 (262a-263a, 521a-522a). According to Marcus and Itkin, it was finally agreed between the alleged co-conspirators other than Fried and Grand that a total of $1,600 still remained due from Fried, and that $1,000 thereof would go to Pizzo and $600 to Marcus (523a). The $1,600 was never paid (528a).

The only occasion for interstate telephone calls arose because Motto, who was a labor union official with an office in Long Island City, New York, lived in Greenwich, Connecticut (200a). Marcus and Itkin testified that they made telephone calls to Motto, both at his office and at his home (217a, 237a, 251a, 262a, 504a, 506a, 509a, 514a, 515a, 516a, 545a), and the Government introduced records of the telephone company showing a total of seven calls between

Motto's home in Greenwich, Connecticut and Marcus' home or Itkin's home or office in New York City on various dates between October 1966 and August 1967 (826a).

Though the telephone company had turned over to the Government records of telephone calls made from Fried's and Grand's telephones (831a), the Government adduced no evidence to show that Fried had ever made any telephone calls to or received any calls from Motto. There was likewise no evidence to show that Fried had any knowledge or awareness of any telephone communications between Motto and any of the other alleged co-conspirators. *There was indeed no showing that Fried had any knowledge that Motto lived outside New York.*

The only independent evidence adduced by the Government of Fried's own words and acts for the purpose of showing Fried's and Grand's connection with the alleged conspiracy to use the interstate telephone in violation of 18 U.S.C. § 1952, was as follows:[3]

(a) Marcus testified that he first met Fried in October 1966, when he was introduced to him by a Republican political leader, one Vincent Albano, and that Albano stated that he would be very appreciative if Marcus "could give the job of Jerome Park Reservoir to Mr. Fried", and added that Fried "had always been a heavy contributor to the Republican party" (218a-219a). Marcus testified that Albano had previously talked to him about Fried on numerous occasions over a period of months (219a-220a), but never offered Marcus a single dollar as a bribe (370a).

(b) Itkin testified to various statements allegedly made by Fried at two meetings at the Commodore Hotel, the first in July 1967 and the second in early August 1967. Itkin met Fried for the first time at the July meeting, when Marcus introduced him to Fried as Marcus' "friend and advisor" and then excused himself to let Itkin talk to Fried alone (265a-266a, 524a).

According to Itkin, Fried at the July meeting suggested that Itkin handle future deals with the City through Fried,

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[3] The evidence against Grand consisted only of the evidence against Fried, its president (see 1212a).

saying that "there is no reason to share with these other guys" and that he could "handle the biggest payoffs in the City" and could "handle a quarter of a million dollars in green at any one time if the deal is big enough" (525a). Itkin, according to his testimony, then said to Fried that Fried had "only paid 30,000 of a $40,000 contract, and that doesn't sound very big", whereupon Fried said "What do you mean, I paid 30? I paid 40" (525a). Itkin further testified that Fried then confirmed that he owed $1,600 more, and upon Itkin's saying that he couldn't deal with Fried until Fried finished the deal with the other "people", Fried said that he would "pay Danny Motto the money back within a week" (525a-526a).

Itkin admitted on cross-examination, however, that at the same July meeting at which Fried was allegedly suggesting future bribe transactions involving City contracts, Fried turned Itkin down when Itkin asked him to invest in land in the Dominican Republic (611a). Both Itkin and Marcus admitted on cross-examination that Itkin had received a number of payoffs from contractors who did business with the City, other than Fried, through the medium of purported property investments or construction contracts in the Dominican Republic (330a-331a, 424a-426a, 428a, 612a-613a, 681a). Yet, as noted, Itkin admitted that Fried turned down his proposition for such an investment.

Itkin testified that his second meeting with Fried at the Commodore in August was arranged by Orlando (526a-527a). According to Itkin, Fried at this second meeting asked Itkin to obtain a certain contract for Orlando for the cleaning and repair of the Central Park Reservoir, in which Fried would participate "as a sort of undisclosed partner" and would provide Orlando with the necessary equipment, and Fried said that he would "take care of the green, since Edward Orlando couldn't" (547a-548a, 608a, 609a-610a). Itkin also testified that Fried at this meeting handed Itkin $1,500 in cash on behalf of Orlando, constituting a bribe payment for a small emergency contract which the Water Department had given Orlando (527a, 610a). Itkin further testified that he had Orlando

at this meeting ask Fried whether Fried had paid the $1,600, and that Fried first brushed the matter aside and then said that he would take care of the $1,600 payment prior to the opening of Fried's horse farm on August 20, 1967, and invited Itkin to the opening (527a).

Itkin admitted, however, on cross-examination that he might have asked Fried again at this second meeting to invest in Dominican land and that Fried again turned him down (680a). Significantly, though Orlando purportedly did not have $1,500 available to pay his bribe debt to Itkin, Orlando stated at this meeting, according to Itkin, that he would put up $5,000 for an investment in Dominican land if Fried would put up $5,000 (680a). Itkin also admitted that the Central Park Reservoir job was never given out to anyone, but that Orlando, prior to this meeting, had given him an advance bribe payment for the job, which he never returned (610a, 684a, 431a-432a).

(c) Itkin testified that he went to the opening of Fried's farm on August 20, 1967 and that Fried, in a brief conversation there, said "I finished up with Danny" (527a-528a), or "'I have paid Danny' or something to that effect" (688a).

(d) Marcus testified that in a conversation outside the grand jury room on the morning of December 18, 1967, Fried said to him "They are on a fishing expedition, they haven't got anything on us" (276a-277a). He further testified that late in the afternoon of the same day, while the defendants were being fingerprinted in the basement of the Federal Building, Fried came up to him and, in a loud tone of voice in the presence of U.S. Marshals, said "They haven't got anything on us. If we all keep quiet, we will be all right" (277a, 407a). Itkin testified that Fried also made a similar statement to him in a conversation in the grand jury anteroom on the morning of the same day (533a-534a).

(e) The Government, over objection and motion to suppress, was permitted to introduce in evidence Fried's testimony before the Grand Jury, in which Fried denied hav-

ing made any agreement to pay a 5% kickback and further denied having made any payment to D'Angelo or anyone "for being awarded this contract" (872a). He further denied having discussed the Jerome Park Reservoir contract with D'Angelo or Pizzo (870a, 880a). He gave substantially the same versions that he testified to at the trial (see *infra*, p. 12), of his two meetings with Itkin at the Commodore Hotel, at the first of which Marcus also appeared (870a-873a), as well as of his having met Motto on but a single occasion, in May or June of 1967, when D'Angelo drove Motto up to Fried's farm sometime prior to its opening (878a, 869a, 875a).

Taking the stand in his own defense, Fried testified that he never talked with anyone prior to the award of the Jerome Park Reservoir contract to Grand on November 23, 1966 concerning any kind of fee or kickback in connection with that contract (991a-992a). He first learned about the reservoir job from Grand's representative, Rosenwasser, who, as above noted, had several meetings with the City engineers and who believed on the basis of those meetings that Grand would get the contract (954a-955a, 958a, 912a-918a, 922a).

According to Fried, D'Angelo, an attorney who did legal work for some of Fried's companies (992a), came into his office in the late afternoon of Friday, November 25, 1966, shortly after Fried had received the written contract for the job and said he wanted Fried to know that he had helped Fried "get this job" and demanded a 5% finder's fee (961a-963a). Fried refused to pay any such fee, but Pizzo contacted him the following week and insisted that he pay the fee, threatening a "slow down" in Fried's business operations if the fee were not paid (968a). Fearing Pizzo's power in the construction field, Fried agreed to pay the 5% finder's fee to D'Angelo in installment payments (966a-972a, 997a). Fried then arranged with his Comptroller to make payments to D'Angelo on account of the 5% finder's fee as periodic bills were sent to the City for the work done (972a-973a). A total of about $40,000 was thus paid to D'Angelo (974a).

Fried's versions of his meeting with Marcus and Albano, and of his meetings at the Commodore with Itkin, differed sharply from those testified to by Marcus and Itkin. He thus testified that he never discussed the reservoir job with Albano and that it was never mentioned at the meeting at which Albano introduced him to Marcus (956a-958a, 960a). As regards the Commodore meetings, Fried testified that he went to both meetings at the request of Orlando, with whom he had business dealings (1090a), and that all that transpired in both meetings was that Itkin tried to interest him in investing about $25,000 in some land in the Dominican Republic and that Fried turned him down, and that at the second meeting Itkin, out of a clear blue sky, said to Fried "What did you pay on that Jerome Reservoir?" and that Fried was taken by surprise and said "$40,000" (980a-985a).

Fried denied having invited Itkin to the opening of his farm or having seen or spoken with him there (997a-998a). He also denied that he ever called Marcus on the telephone (982a), or that he ever spoke with or called Corallo (979a-982a). Fried met Motto on but one occasion about May or June 1967, when D'Angelo arranged to have Motto, to whom he referred as a client of his who was a labor union official interested in horses, see Fried's horse farm prior to its opening, and they talked only about horses, and Fried never saw Motto again until the day of the indictment and never called him or otherwise spoke with him (978a-979a, 973a, 982a).

Fried further testified that when he appeared in the grand jury anteroom on the morning of December 18, 1967, prior to testifying before the grand jury, he was approached by Pizzo who said "Make sure you testify no money was passed or you are apt to find your body in an empty lot", and that D'Angelo also approached him and said he was going to testify that "no money was passed" (1003a). Fried testified that he lied before the grand jury as to the $40,000 payment and his discussions with D'Angelo and Pizzo, because of fear for his life (1003a-1004a). He flatly

denied (1001a-1002a) having spoken to Marcus or Itkin on December 18 or having made the statements to which they testified (*supra,* p. 10).

Rulings of District Court and Decision of Court of Appeals

The District Court initially admitted the various alleged co-conspirators' declarations in evidence, over objection, only on a tentative basis, conditioned on a showing by independent evidence as respects each defendant of his connection with the charged conspiracy (196a-198a, 1224a-1225a).

At the close of the Government's case, counsel for petitioners Fried and Grand moved for judgment of acquittal on the basis of the insufficiency of the evidence, urging, among other grounds, that there was "no evidence that the defendants Fried or Grand ever used or caused to be used any facility in interstate commerce or that they had any knowledge thereof or contemplated any such use" (897a-898a). The District Court denied that motion (909a) as well as the renewed motion for judgment of acquittal on the same grounds made by said petitioners at the close of the entire case (1149a).

As noted above, the only issue submitted by the District Court to the jury regarding the use of a facility in interstate commerce was with reference to evidence of interstate telephone communications between New York City and Greenwich, Connecticut (1221a-1222a). With respect to that issue, the Court left it to the jury to determine, as to each of the defendants, whether "there was an informed participation by him [the defendant] in an agreement or understanding, which intended to use interstate phone communications or which reasonably contemplated the use of such communications, if required, to further the illegal activity" (1231a).

The Court further charged the jury that they were not to consider any declarations of alleged co-conspirators against any particular defendant unless they first determined, on the basis of the independent evidence of such defendant's

words or deeds alone, that he was a knowing and wilful participant in the charged conspiracy (1224a-1225a).

As more fully shown below, in rejecting petitioners' contention that they were entitled to judgments of acquittal because of the insufficiency of the independent evidence against them to establish the essential element of their knowledge or reasonable contemplation of the use of the interstate telephone, the Court of Appeals held that the declarations of alleged co-conspirators could properly serve to supply any deficiencies in that regard in the independent evidence, and that "the totality of the proofs", including such declarations, warranted the jury in making the requisite finding (App. A, *infra*, pp. 44a-50a).

Additional facts, including the rulings below on the other questions presented, are set forth *infra* under the discussion of the particular questions.

REASONS FOR GRANTING THE WRIT

1. As to whether the hearsay declarations of alleged co-conspirators could properly serve to supply the requisite evidence against petitioners of the essential, jurisdictional element of knowledge or reasonable contemplation on their part of the use of interstate telephone communications, as held by the Court of Appeals below.

The questions here presented are worthy of review by this Court, because (a) they concern the important matter of the proper criteria for determining the legal sufficiency of the evidence in the trial of a Federal conspiracy prosecution; (b) the decision of the Court below engenders confusion and uncertainty with respect to such criteria and is in conflict with decisions of this Court and of Courts of Appeals in other circuits; and (c) the matter is of particular importance as respects conspiracy prosecutions, such as this, under 18 U.S.C. § 1952, affecting as it does the extent to which Federal prosecutors will be able to invoke that statute, as they are doing today with increasing frequency,

for Federal prosecution of acts which would otherwise be purely State offenses.

As the statute, 18 U.S.C. § 1952, makes clear, one of the essential elements of the crime defined by it is the use of a facility in interstate commerce with intent to promote an "unlawful activity". *United States* v. *Barnes,* 383 F.2d 287, 290-291 (6th Cir.), cert. den. 389 U.S. 1040; *United States* v. *Hawthorne,* 356 F.2d 740, 742 (4th Cir.). Without that element, there would be no Federal jurisdiction, and all that would remain would be a local offense, here the State crime of bribery, punishable by the State alone. See *Stirone* v. *United States,* 361 U.S. 212, 218.

The authorities establish that where, as here, an essential element of the particular substantive offense is the use of a facility in interstate commerce in furtherance of a particular unlawful objective, without which there would be no Federal jurisdiction, a defendant charged with being a party to a conspiracy to commit such offense cannot be convicted on that charge in the absence of evidence sufficient to show that he knew or at least had reason to expect that such a facility in interstate commerce was or would be used or caused to be used in furtherance of the unlawful objective, and that he agreed to the use of the same. *United States* v. *Crimmins,* 123 F.2d 271, 273-4 (2d Cir.); *United States* v. *Barnes, supra,* 383 F.2d at 291-3; *Twitchell* v. *United States,* 313 F.2d 425, 429 (9th Cir.), vacated and remanded in other respects, *sub nom. Rogers* v. *United States,* 376 U.S. 188.

To convict such a defendant of the Federal conspiracy charged, it is not sufficient merely to prove that he was a party to a conspiracy to commit the local State crime. *United States* v. *Barnes, supra,* 383 F.2d at 291, 292; *Twitchell* v. *United States, supra,* 313 F.2d at 428, 429. It is essential to prove that he was a knowing and wilful party to a conspiracy "with a purpose illegal under federal law" —i.e., to use a facility in interstate commerce in furtherance of the illegal local activities. See *Ingram* v. *United States,* 360 U.S. 672, 677. The requisite intent on the part of the particular defendant to commit the Federal crime can be

established only by proof of such defendant's knowledge of the use of the interstate facility, since "Without the knowledge, the intent cannot exist". See *Ingram* v. *United States, supra,* 360 U.S. at 678.

Nor is it sufficient to prove merely that the alleged co-conspirators had knowledge of the use of the interstate facility, or to speculate that if the particular defendant had known of such use, "it would have made no difference in his conduct." See *United States* v. *Crimmins, supra,* 123 F.2d at 273-4, holding, in an opinion by Judge Learned Hand, that a defendant who had purchased in New York securities stolen in other states, could not be convicted on a charge of being a party to a proven conspiracy to transport such stolen securities in interstate commerce, without proof of knowledge on his part—as distinguished from the knowledge of the alleged co-conspirators—, not only that the securities had been stolen, but that they had been transported across state lines. Judge Hand expressed the underlying rationale as follows (123 F.2d at 273):

> "* * * Courts do indeed say that each conspirator is chargeable with the acts of his fellows done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture *as all understand it;* not indeed in its details, but *so far as concerns those terms which constitute the substantive crime.* It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond *the reasonable intendment of the common understanding.* * * *"

Similarly, in *Twitchell* v. *United States, supra,* involving a proven conspiracy to transport girls across state lines for purposes of prostitution in violation of the Mann Act, the conviction of a local sheriff who was shown to have collected payoffs to permit the operation of the particular prostitution ring in his county, and whose "bag man" was shown to have knowledge of the interstate transportation, was reversed because of the absence of sufficient evidence—as distinguished from suspicion—to show that he had

"*actual knowledge* of the * * * illegal interstate transportation" or that he had "*directly* agreed to a scheme which could not be consummated without illegal transportation, or * * * in which it was known that the likelihood of illegal interstate transportation was *great*" (313 F.2d at 429; emphasis the Court's).

It is further the settled rule that a defendant's participation in a charged conspiracy can be established only by independent proof of his own words and acts, without regard to the hearsay declarations of alleged co-conspirators, and that hearsay will not be permitted to "lift itself by its own bootstraps to the level of competent evidence." See *Glasser* v. *United States,* 315 U.S. 60, 74-5; *United States* v. *Bentvena,* 319 F.2d 916, 949 (2d Cir.), cert. den. 375 U.S. 940; *Harlow* v. *United States,* 301 F.2d 361, 368 (5th Cir.), cert. den. 371 U.S. 814; *Ferina* v. *United States,* 302 F.2d 95, 104-5 (8th Cir.), cert. den. sub. nom. *Cardarella* v. *United States,* 371 U.S. 819; *Tripp* v. *United States,* 295 F.2d 418, 422 (10th Cir.).

While the independent evidence of petitioner Fried's own words and acts in this case might be sufficient to support a finding that he was a party to a separate conspiracy to commit the New York crime of bribery of a New York public official, it was clearly insufficient as a matter of law to support a finding that he was a party to the charged Federal conspiracy to use interstate telephone communications with intent to promote the local crime of bribery.

The evidence showed that the only occasion for interstate telephone calls in this case came about because Motto, whose office was in New York City, lived in Greenwich, Connecticut and had some telephone conversations from his home with some of the alleged co-conspirators other than Fried. The record is, however, completely barren of any independent evidence to show that Fried ever had any telephone conversations with Motto, or knew of any telephone conversations between Motto and any of the other alleged co-conspirators, *or indeed had any knowledge that Motto lived in Greenwich, Connecticut.* There could accordingly be no evidentiary basis for any inference that Fried had

any reason to expect or contemplate that there would be any *interstate* telephone calls in furtherance of the alleged bribery activity. So far as he was concerned, all the activities involved were of a purely *intrastate* nature.

The Court of Appeals in the instant case acknowledged that "Proof of the participation of a particular defendant in the conspiracy must be by his own words and acts" (App. A, *infra*, p. 45a). It held, however, that "in a joint conspiracy trial the proof sufficient to establish the participation of a defendant in the conspiracy" is *not* "the same as the proof sufficient to carry the case to the jury as against that same defendant" (*Id., infra*, pp. 44a-45a). The Court then went on to hold that since there was independent evidence to show that Fried "was a participant", *presumably in the local bribery conspiracy*,[4] a sufficient basis was thereby afforded for the admission into evidence against Fried of the hearsay declarations of the other participants in the local bribery conspiracy, with the consequence that such hearsay declarations could then be considered by the jury in determining whether "the totality of the proofs, including . . . declarations of co-conspirators . . .", established Fried's participation *in the charged Federal conspiracy* (*Id., infra*, pp. 44a-45a, 47a, 50a).

The effect of the decision below is to sanction the use of hearsay declarations of alleged co-conspirators to fill vital gaps in the independent evidence against a particular defendant, and thereby to vitiate the settled limitations on the use of such hearsay declarations in conspiracy prosecutions. Since, as has been aptly stated, "by hypothesis the

[4] The independent evidence referred to by the Court in this connection (App. A, *infra*, p. 45a) was sufficient only to warrant a finding that Fried "was a participant" in the New York bribery conspiracy. Manifestly, if the Court had intended to hold that there was sufficient independent evidence to establish Fried's participation in the charged Federal conspiracy to use the interstate telephone, it would have been unnecessary for it to engage in its lengthy discussion of the hearsay declarations, or to hold as it did, that such hearsay declarations could be considered by the jury in determining whether the essential element of Fried's knowledge or reasonable contemplation of the use of the interstate telephone had been established (see App. A, *infra*, pp. 45a-50a).

conspiracy and defendant's participation must be independently established before the hearsay may be used against him" (see *United States* v. *Costello,* 352 F.2d 848, 853, fn. 2 [2d Cir.], per Friendly, J., rev'd on other grounds *sub nom. Marchetti* v. *United States,* 390 U.S. 39), it surely contravenes *Glasser* v. *United States, supra,* 315 U.S. at 74-5, to permit the hearsay thus to "lift itself by its own bootstraps to the level of competent evidence".

Moreover, it is axiomatic that "It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding." *United States* v. *Crimmins, supra,* 123 F.2d at 273, per Learned Hand, J. Yet that is precisely the effect of the decision below, under which the hearsay declarations of alleged co-conspirators have been made the predicate for enlarging the scope of the local bribery conspiracy, so far as petitioners are concerned, so as to treat them as parties to a broader Federal conspiracy to use a facility in interstate commerce "beyond the reasonable intendment of the common understanding".

As authority for its position, the Court below cited prior decisions of that Court holding that hearsay declarations of an alleged co-conspirator may be admitted in evidence against a defendant on proof properly deemed sufficient by the trial judge to meet the "threshold requirement" of "a showing of a likelihood of an illicit association between the declarant and the defendant", and that the jury may then consider such declarations in passing on the credibility and weight of the evidence. See, *e.g., United States* v. *Ragland,* 375 F.2d 471, 477 (2d Cir.), cert. den. 390 U.S. 925; App. A, *infra,* pp. 44a-45a.

Manifestly, however, the vague requirement of "a showing of a likelihood of an illicit association" represents a departure from the rule laid down in *Glasser* v. *United States, supra,* 315 U.S. at 74, that the hearsay declarations of an alleged co-conspirator are not admissible against a particular defendant in the absence of "*proof* aliunde that he is *connected with the conspiracy*", or, as otherwise

phrased, in the absence of "*evidence* of the conspiracy and the individual defendant's *participation in it* independent of the declarations." See, e.g., *United States* v. *Halpin*, 374 F.2d 493, 495 (7th Cir.), cert. den. 386 U.S. 1032.

The Court below further stated (App. A, *infra*, p. 44a) that the doctrine applied by it had its roots in Judge Learned Hand's opinion in *United States* v. *Dennis*, 183 F.2d 201, 230-1 (2d Cir.), aff'd. 341 U.S. 494. It is submitted, however, that Judge Hand's opinion in *Dennis* in no way sought to modify the settled rules for determining the legal sufficiency of evidence to warrant the conviction of a defendant charged with being a party to a conspiracy. Judge Hand dealt, not with the question of *legal sufficiency* of evidence, but only with the *fact-finding* function of the jury in relation to *properly admitted* hearsay declarations of alleged co-conspirators. All he decided in that regard was that the jury could take such declarations into account in weighing the evidence against a particular defendant, without being required first to find that the legally sufficient independent evidence itself established such defendant's participation in the charged conspiracy *beyond a reasonable doubt* (183 F.2d at 230-1).

Contrary to the decision below, the *Dennis* doctrine has thus been interpreted by the Court of Appeals for the Ninth Circuit as meaning only that *so long as the independent evidence would be sufficient, if credible, to make out "a prima facie case" of the particular defendant's connection with the charged conspiracy*, the District Court may assume that such evidence is credible, without passing on that issue, and may thereupon receive the declarations in evidence, and that the jury may thereafter take such declarations into account in passing on the questions of credibility and guilt beyond a reasonable doubt. *Carbo* v. *United States*, 314 F.2d 718, 737 (9th Cir.), cert. den. *sub. nom. Palermo* v. *United States*, 377 U.S. 953.

Moreover, even the hearsay declarations referred to in the opinion of the Court below (App. A, *infra*, pp. 45a-50a) contain not a word to show that Fried knew that Motto lived in Connecticut or had any reason to expect that there

would be any interstate telephone calls.[5] What the Court held, however, was that "the totality of the proofs, *including testimony of declarations and acts of co-conspirators in furtherance of the illegal scheme*, reveal the appellant [Fried] as one who was right in the thick of things as a central member, manipulating and closely supervising the carrying out of the principal object of the conspiracy", and that it could therefore be inferred that he had "directly agreed to a scheme in which it was known that the likelihood of use of interstate telephone calls was great" (App. A, *infra*, p. 50a).

The Court's approach, it is submitted, amounts simply to resort to mere suspicion and speculation, which manifestly may not take the place of requisite evidence. *United States* v. *Crimmins, supra*, 123 F.2d at 273-4; *United States* v. *Barnes, supra*, 383 F.2d at 291; *Twitchell* v. *United States, supra*, 313 F.2d at 429. Even the hearsay declarations thus clearly fail to meet the standards of *Ingram* v. *United States, supra*, 360 U.S. at 680, that the requisite evidence of a defendant's guilty knowledge in a conspiracy prosecution be "clear, not equivocal" and that it be not objectionable on the score of seeking to establish "charges of con-

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[5] The Court's opinion (App. A, *infra*, p. 47a) quotes from Itkin's testimony on direct examination (505a) that in November 1966, when Marcus was planning to award the Jerome Park Reservoir contract to Oakhill, Itkin called Motto at the latter's home in Greenwich, Connecticut and Motto told Itkin that Fried had *"just called"* him to complain about this matter. The Government contended that this showed that Fried had called Motto at his home "just" before the call from Itkin. Itkin, however, changed his testimony on cross-examination to state that what Motto said in that telephone conversation was that Henry Fried *"just* called him *like the week before"* to complain about the matter (655a), and for all that appears, any such alleged call the week before could well have been made to Motto at his office in New York City.

The Court also referred in its opinion (App. A, *infra*, pp. 47a-48a) to Motto's alleged hearsay declarations as to how well he knew Fried. Any possible inference based on such declarations is, however, completely refuted by Itkin's testimony that all references made by Motto prior to April 1967 about his knowing Fried were that *"he knew him through Carl D'Angelo,"* and that it was not until April 1967—about a year after the commencement of the charged conspiracy—that Motto claimed to have spoken to Fried for the first time (677a).

spiracy * * * by piling inference upon inference'' (360 U.S. at 680).

2. As to the Fifth and Sixth Amendment rights of a target of a Federal grand jury investigation who is subpoenaed before the grand jury.

The important question here presented, not previously determined by this Court, is whether the doctrine of *Miranda, Escobedo* and *Massiah* is applicable to the secret interrogation before a Federal grand jury, pursuant to subpoena, of one who is a target of the grand jury's investigation. The matter also involves a conflict among circuits.

Petitioner Fried moved in advance of trial to suppress his grand jury testimony for use as evidence (36a-39a). The motion was supported by Fried's affidavit that he was first served with a grand jury subpoena on Sunday, December 17, 1967; that he appeared and testified before the grand jury pursuant to that subpoena the next morning, December 18, at about 10:30 A.M.; and that when he left the courthouse after completing his testimony, he was continuously followed by two FBI agents until about 1:30 P.M., when they arrested him on the indictment herein (38a-39a).

The basis for the motion to suppress was that the surrounding circumstances demonstrated that when Fried testified before the grand jury, he was a *de facto* defendant or at least a target of the grand jury proceeding, and that it was a violation of his Fifth and Sixth Amendment rights to compel him to submit to secret interrogation before the grand jury without the presence of counsel at such interrogation (50a). The motion was denied by District Judge Wyatt (App. B, *infra*, pp. 64a-67a), and a renewed motion to suppress on the same grounds was denied at the trial by the trial judge (810a). The Court of Appeals likewise rejected petitioner Fried's contentions in this regard (App. A, *infra*, pp. 55a-58a).

It is submitted that the doctrine and underlying policy of *Miranda* v. *Arizona* (384 U.S. 436), *Escobedo* v. *Illinois* (378 U.S. 478) and *Massiah* v. *United States* (377 U.S. 201) apply with equal force to a situation where, as here, one

who is a target is subpoenaed by the Government for the purpose of eliciting testimony against him in a secret interrogation without the presence of counsel. In *Massiah,* this Court held that a defendant under indictment could not be subjected to secret interrogation by the Government in the absence of counsel, without violating his Sixth Amendment right to counsel. That doctrine was thereafter extended, first in *Escobedo,* and then more broadly in *Miranda,* on the basis of the Fifth as well as Sixth Amendments, to encompass governmental "interrogation of persons suspected or accused of crime" "in all settings in which their freedom of action is curtailed in any significant way" (*Miranda* v. *Arizona, supra,* 384 U.S. at 467).

It can hardly be claimed that in the face of the compulsive force of the subpoena served upon him, Fried's "freedom of action" was not "curtailed in any significant way". See Meshbesher, "Right to Counsel Before Grand Jury", 41 F.R.D. 189, 201.

Under *Miranda,* the rights of an accused whom the Government seeks to interrogate specifically include "the right to consult with a lawyer and *to have the lawyer with him during interrogation*", or, phrased in another way, the "right *to have counsel present at the interrogation*" (384 U.S. at 471, 469).

The mere fact, emphasized by the Court below (App. A, *infra,* p. 55a), that Fried was informed that he was a target and was advised that he had "a right to consult an attorney" and a privilege to refuse to answer incriminating questions (867a-868a), and that his attorney was permitted "to sit in the anteroom to give advice if the witness so desired" (App. A, *infra,* p. 57a), does not fully meet the standards laid down in *Miranda.* As this Court there pointed out, "Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process", and "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, *but also to have counsel present during any questioning if the defendant so desires.*" (384 U.S. at 470).

Contrary to the view expressed by Judge Wyatt (App. B, *infra,* p. 66a), it was not incumbent on petitioner Fried to request that he be permitted to have counsel present in the grand jury room. This Court thus made it clear in *Miranda* that "An individual need not make a pre-interrogation request for a lawyer" (384 U.S. at 470). Nor can there be any question with regard to a possible waiver, unless and until the individual sought to be interrogated has been "clearly informed that he has the right to consult with a lawyer *and to have the lawyer with him during interrogation*" (384 U.S. at 471).

Even prior to *Miranda,* four judges of the Court of Appeals for the District of Columbia took the position in *Jones* v. *United States,* 342 F. 2d 863, 867-71, in an opinion by Judge Edgerton (two additional judges concurring on another ground), contrary to the decision below, that it was a violation of the Fifth and Sixth Amendment rights of a person against whom a grand jury investigation was directed, for the prosecutor to summon such a person before the grand jury "and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public."

It has further been observed that even "the logic of *Escobedo* would seem to require application of its safeguards to grand jury and other investigatory proceedings, whose purposes are to determine probable guilt." See "The Supreme Court, 1963 Term", 78 Harv. L. Rev. 143, 222-3. It has also been observed that a person subpoenaed before a grand jury has even a greater need than a person under arrest for the presence of counsel, at each step of the interrogation, in order to protect his "right to choose between silence and speech" as regards incriminatory questions (*cf. Miranda* v. *Arizona, supra,* 384 U.S. at 469), since the person under subpoena can refuse to answer only questions which may tend to incriminate him and he requires "the guiding hand of counsel" question by question. See Meshbesher, *supra,* 41 F.R.D. at 203; *Jones* v. *United States, supra,* 342 F. 2d at 868.

This Court's five-to-four decision in *In Re Groban* (352 U.S. 330, 333), which was cited by Judge Wyatt (App. B, *infra,* p. 67a), must be re-evaluated in the light of *Miranda* and *Escobedo.* See Meshbesher, *supra,* 41 F.R.D. at 205.

3. As to the effect of Itkin's role as an undercover Government informer as precluding his being considered a co-conspirator for the purposes of the co-conspirator exception to the hearsay rule.

The importance of the question here presented is confirmed by the expressed policy of this Court to limit the scope of the "very narrow exception to the traditional hearsay rule" relating to the admissibility of declarations made by a co-conspirator. See *Wong Sun* v. *United States,* 371 U.S. 471, 491; *Krulewitch* v. *United States,* 336 U.S. 440, 443-5.

The Government called Marcus as a witness before Itkin, and Marcus was permitted to testify to a great number of out-of-court declarations made to him by Itkin concerning the acts and declarations of the other defendants (207a-209a, 210a, 213a, 216a-217a, 223a, 232a-233a, 236a, 253a, 256a-257a, 259a, 260a-261a, 264a, 266a-268a, 270a). Such declarations were received in evidence on the theory that they were made by Itkin as a co-conspirator, in furtherance of the alleged conspiracy (197a-198a).

The prosecutor made no mention in his opening statement (139a-141a) of Itkin's being a Government informer, and the defense had no evidence thereof or any basis for objection on that ground until Itkin admitted to that role when he was cross-examined. At that point, petitioners promptly moved for a mistrial and to strike the aforementioned Marcus testimony, on the ground that since Itkin had been acting as an undercover Government informer, he could not be regarded as a co-conspirator and his out-of-court declarations were not admissible in evidence under the co-conspirator exception to the hearsay rule (596a-597a). The motions were denied (597a). The same motions were again made, and denied, at the close of the Government's case (899a-902a, 909a).

Itkin unequivocally testified on cross-examination—without any denial by the Government—that despite his apparently active participation in the alleged conspiracy, he was not guilty of the charges in the indictment because he was "accumulating this evidence to give to the United States Government to prosecute this case" and was "working for the Government" (550a, 561a); that he was indicted in this case "merely for purposes of cover" (772a), and the United States Attorney's office had advised his attorney that it would recommend that the indictment against him be *nolle prossed* (753a, 758a-759a); that his intent throughout his activities in this case was to make a full report to the FBI when he had completed gathering the necessary evidence (567a, 800a, 801a); that he had commenced his role as a Government informer in 1962 (550a), when the FBI asked him "to infiltrate organized crime as deep as * * * [he] could" (802a); that he carried out that assignment by posing as a participant in various illegal activities (552a-553a); that he reported regularly to the Government from 1962 through 1967 as well as in 1968 (550a); that while he did receive instructions from the FBI from time to time in the course of these activities, "Most of the time they left" him "on * * * [his] own" (727a); that his reason for withholding the details of the Jerome Park Reservoir matter from the FBI until he had gathered all the evidence which he deemed necessary for prosecution was that he was concerned that as a matter of routine the FBI would disseminate the information in its reports among other Government departments and his secret role would be uncovered (555a, 556a, 558a); that while the FBI did not know the specific matter on which he was working in this case, it did know that he was working on some matter for the purpose of building a case for Government prosecution (567a); that he had notified the FBI of his becoming associated with Marcus in their joint business venture known as Conestoga Investments, Ltd. at or about the time of its formation in 1965 (695a); and that he had also reported to the FBI on June 1, 1966 regarding one of his initial meetings with Corallo and Motto, though his report did not disclose the actual content of their conversation (557a).

Indeed, the Government's attorney in summation affirmatively sought to support Itkin's credibility by emphasizing his role as a Government informer, not merely after the events about which he testified in this case, but for a five year period which overlapped the period here involved (1161a).

In rejecting petitioners' contentions on this score, the Court of Appeals singled out three answers given by Itkin in the course of a lengthy cross-examination and held that there was *no "evidentiary basis"* for the "contention that Itkin's participation in the conspiracy charged in this case was as a Government Agent, in cooperation with the FBI, to help appellants provide proof of their guilt", thereby overlooking all the foregoing evidence (App. A, pp. 35a-38a). The Court of Appeals (*id.*, p. 36a) further emphasized that Itkin "pocketed the money". Itkin testified, however, that he had shared in "the bribes" because "there was no other way to infiltrate" (589a), and that on some other occasions the FBI had allowed him to keep monies which he had realized from illicit deals (708a).

The courts in other Circuits have squarely held that "one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator", since he "secretly intends to frustrate the conspiracy." *United States* v. *Chase,* 372 F.2d 453, 459 (4th Cir.); *Sears* v. *United States,* 343 F.2d 139, 142 (5th Cir.). The necessary consequence, as held also in the Second Circuit, is that the out-of-court declarations of such an informer cannot be received in evidence as the declarations of a co-conspirator under the co-conspirator exception to the hearsay rule. *United States* v. *Morello,* 250 F.2d 631, 634 (2d Cir.); *United States* v. *Costello, supra,* 352 F.2d at 855.

Notwithstanding the unequivocal showing made by Itkin's own testimony—on the evident basis of which the Government intended to recommend that the indictment against Itkin be *nolle prossed*—that Itkin's role throughout his activities in this case was that of a secret Government informer whose intent was to gather evidence for Government

prosecution and thereby to frustrate the conspiracy, the courts below have sanctioned the admission in evidence of the many out-of-court declarations made to Marcus by Itkin, on which the Government attorney relied in his summation as corroboration of Itkin's own testimony (1163a). It is submitted that prejudicial error was thereby committed.

4. As to the permissible scope of the cross-examination of a defendant's character witness.

An important aspect of the general subject of cross-examination of a defense character witness, considered by this Court in *Michelson* v. *United States,* 335 U.S. 469, is here presented, and it is submitted that the action taken below in this case is in conflict with *Michelson.*

In cross-examining one Lustbader, a character witness for petitioner Fried, the prosecutor was thus permitted, over objection, to ask the witness whether he had "heard in the community *the fact* that Mr. Fried had paid $20,000 to Carmine DeSapio on behalf of Consolidated Edison so that Consolidated Edison would get a high line permit from the City of New York" (1100a), and whether he had "heard in the community that Mr. Fried is able to handle and has handled the biggest payoffs made in the City of New York" (1101a-1102a). The witness answered both questions in the negative (1101a, 1102a). The trial court also denied petitioner Fried's motion for a mistrial (1100a), and instructed the jury that the questions asked bore solely on "the credibility" of the witness in purporting "to bespeak the community's opinion" of petitioner Fried's reputation (1100a-1101a, 1263a).

The questions thus asked related to highly prejudicial collateral allegations of other wrongdoing against petitioner Fried, which were obviously of a secret, unpublicized nature and not shown to be likely to come to the attention of the community at large. The questions thus did not meet the standard indicated in *Michelson* that "the target of the question . . . [be] *an actual event, which would probably*

result in some comment among acquaintances if not injury to defendant's reputation'' (335 U.S. at 481).

In such circumstances, it is submitted, the prosecutor's ''inquiry is without probative significance'' on the issue of reputation and could only serve the improper purpose of prejudicing petitioner Fried. *Cf. United States* v. *Giddins,* 273 F.2d 843, 845 (2d Cir.), cert. den. 362 U.S. 971. Indeed, the jury in the instant case was improperly permitted to speculate that the subject matter of the questions related to actual events which did occasion comment in the community, and to infer that the witness' qualifications ''to speak on behalf of the community'' were in doubt in view of his denial of any knowledge of such matters. *Cf. United States* v. *Beno,* 324 F.2d 582, 588 (2d Cir.), cert. den. 379 U.S. 880.

Further, the practice relating to cross-examination of a defendant's character witnesses ''has been cogently criticized . . . on the ground of the jury's inability to limit its consideration of such evidence to the issue of reputation.'' See *United States* v. *Giddins, supra,* 273 F.2d at 845. It is submitted that the entire subject should be reconsidered by this Court, particularly in the light of *Bruton* v. *United States,* 391 U.S. 123, where the Court, albeit in a different context, rejected the previously accepted doctrine that it could be assumed that a jury would follow the trial court's instructions as to the limited effect to be given to particular prejudicial evidence.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 18, 1969.

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 331, 332, 333 & 334—September Term, 1968.

(Argued January 17, 1969 Decided July 8, 1969.)

Docket Nos. 32686, 32687, 32688 & 32689

UNITED STATES OF AMERICA,

Appellee,

—against—

ANTONIO CORALLO, HENRY FRIED, DANIEL J. MOTTO and S. T. GRAND, INC.,

Defendants-Appellants.

Before:

MEDINA, WATERMAN and KAUFMAN,

Circuit Judges.

Appendix A—Opinion of United States Court of Appeals

Appeals from judgments of conviction in the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge*.

Antonio Corallo, Henry Fried, Daniel J. Motto and S. T. Grand, Inc. appeal from judgments entered on a jury verdict, convicting appellants of violations of 18 U.S.C., Section 371. See also 18 U.S.C., Section 1952.

Affirmed.

MEDINA, *Circuit Judge:*

Antonio Corallo, Henry Fried, Daniel J. Motto and S. T. Grand, Inc. appeal from judgments convicting them of conspiracy to use the telephone as an interstate facility with intent to violate the New York State bribery laws. The federal statutes involved are the general conspiracy law, 18 U.S.C., Section 371, and 18 U.S.C., Section 1952, which makes it a crime against the United States to use an interstate facility with intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," including bribery in violation of state law. The indictment, handed down December 18, 1967 charged appellants together with James Marcus and Herbert Itkin and Charles Rappaport. Carl D'Angelo, Jr., is named as a co-conspirator but not as a defendant. Before the trial Marcus pleaded guilty and the case against Itkin was severed. After a jury trial presided over by Judge Edward Weinfeld, Rappaport was found not guilty and appellants

were convicted. The principal, but not the only witnesses for the prosecution were Marcus and Itkin.

While the meetings, conversations and acts of the conspirators, and the various maneuverings, developments, sub-plots and backings and fillings are complicated and cover an extended period of time, the charge itself is a simple one. It is that Marcus, as Water Commissioner of the City of New York, had the sole discretionary power to award, without public bidding, on a cost-plus basis, a contract involving an estimated cost of $500,000 to $1,000,000, for the cleaning of the Jerome Park Reservoir in the Bronx; that appellants conspired with Marcus to arrange a kickback from Fried and S. T. Grand, Inc., Fried's company, if Marcus awarded the contract to Grand; and that the interstate use of the telephone was reasonably in the contemplation of the conspirators because of the nature of the negotiations and the necessity for caution and secrecy incident upon the collection of the kickback, as Motto, a principal negotiator, was a resident of Connecticut.

SYNOPSIS OF OPINION

PART I

THE CONSPIRACY AND APPELLANTS' PARTICIPATION IN IT.

PART II

ALLEGED ERRORS IN THE INSTRUCTIONS TO THE JURY AND IN REFUSALS TO CHARGE AS REQUESTED.

A

Proof of Events After the Award of the Contract to Fried on November 23, 1966 Was Relevant to the Crime Charged in the Indictment.

B

Whatever May Have Been Itkin's Contact With the FBI Nothing in This Record Supports Appellants' Claim That He Participated in the Conspiracy as a Government Agent.

1.

Itkin's Participation in This Conspiracy Was Wholly on His Own. The Record Does Not Sustain Appellants' Claim That Itkin Participated as a Government Agent Pretending to Be a Conspirator.

2.

The Request for Instructions on the Subject of Entrapment Was Properly Denied.

3.

The Trial Judge Properly Charged That in Prosecutions in Federal Courts for the Commission of Federal Crimes the Testimony of an Accomplice Requires No Corroboration to Sustain a Conviction.

C

THE REQUESTS TO CHARGE ON THE SUBJECT OF EXTORTION WERE PROPERLY DENIED.

PART III

AFTER CONSIDERING "ALL THE EVIDENCE IN THE CASE" THE JURY WAS WARRANTED IN FINDING THAT FRIED AND GRAND PARTICIPATED IN THE CONSPIRACY WITH REASONABLE ANTICIPATION THAT THE INTERSTATE TELEPHONE WOULD BE USED BY THE CONSPIRATORS OR SOME OF THEM TO EFFECT THE PURPOSES OF THE CONSPIRACY.

PART IV

THE CONDUCT OF THE TRIAL.

Appendix A—Opinion of United States Court of Appeals

A

THE GRAND JURY TESTIMONY OF FRIED AND MOTTO WAS PROPERLY RECEIVED AND IT WAS NOT AN ABUSE OF DISCRETION TO DENY THE MOTIONS FOR A SEVERANCE.

B

WE FIND NOTHING IMPROPER OR PREJUDICIAL IN CERTAIN COMMENTS BY THE TRIAL JUDGE.

C

IN VIEW OF THE DIRECT EXAMINATION OF FRIED AND HIS TESTIMONY ON CROSS-EXAMINATION BY COUNSEL FOR OTHER APPELLANTS TO WHICH NO OBJECTION WAS RAISED ON FRIED'S BEHALF IT WAS PROPER FOR THE TRIAL JUDGE TO ASK FRIED WHETHER PRIOR TO THE TRIAL HE HAD INFORMED THE PROSECUTOR THAT PART OF HIS TESTIMONY BEFORE THE GRAND JURY WAS FALSE.

PART I

THE CONSPIRACY AND APPELLANTS' PARTICIPATION IN IT.

Even a superficial study of the record indicates a substantial basis for the findings of the jury that there was in fact such a conspiracy and that each of the appellants was a knowing participant in it. Fried testified and ad-

mitted that he told Itkin he had paid $40,000. There was proof of the extensive use of the telephone both to Motto at his Connecticut residence and from Motto in Greenwich, Connecticut, to various members of the conspiracy in New York City, corroborated in many instances by telephone toll slips produced by the Telephone Company. Moreover, the web of association between the appellants and Marcus and Itkin is clearly established. With this in mind, we turn to our chronological statement of the facts, based upon the view of the testimony and exhibits most favorable to the prosecution.

James Marcus began his career in city politics by serving as an assistant campaign manager to John Lindsay as Lindsay ran for election as Mayor of New York in the Summer and Fall of 1965. In June or early July, 1965, Marcus was introduced to Herbert Itkin, a lawyer with connections in labor circles. He came to see Itkin frequently, until, after the election, he saw him practically every day. Itkin, in turn, introduced Marcus, in July, to Daniel Motto who was President of Local #350 of the Bakery & Confectionery Workers Union in Long Island City, and head of the Labor Non-Partisan League. Marcus hoped to gain an endorsement of Lindsay by Motto and by Motto's union supporters. With this end in view Marcus saw Motto several times during the campaign. After Lindsay's election in November of 1965, Marcus continued to see Motto and at one such meeting, in December of that year, when they went to a diner next door to Motto's Long Island City office for a cup of coffee, Motto introduced Marcus to Antonio Corallo, describing him

simply as "my cousin Tony." In that same month, Itkin and Marcus, with several others, formed Conestoga Investments, Ltd., to discover and promote the financing of investments in foreign countries.

In January of 1966, as the new administration took office, Marcus was given an office at the Municipal Building, in the Water Department. Marcus acted for a time as a liaison between the new administration and the Water Department, and, once he was sworn in as Assistant to the Mayor in March, 1966, he began to oversee the activities of the Department. In the course of this supervision, in March, he learned from Abraham Groopman, then Deputy Chief Engineer of the Department, that the Jerome Park Reservoir in the Northern Bronx was in bad shape. The previous fall, in November of 1965, heavy winds had roiled the reservoir and an accumulation of sludge that lay at the bottom of the basin had risen to the top and gone out into the water distribution system of the Bronx. There were many complaints of dirty water, odors and bad tastes. Temporary measures were taken but, as the problem recurred, more drastic measures became necessary. The reservoir had not been cleaned since its opening in 1905 and its huge size—97 acres in surface area and 750 million gallons of water in capacity—as well as the apparently huge amount of sludge presented difficulties beyond the resources of the Water Department to remedy.

An emergency contract was proposed by the engineers of the Department to Marcus. By this procedure a qualified contractor is selected by the Commissioner to perform the job. The contractor is paid his costs plus an allowance for

overhead and a specified profit, subject, of course, to audit and revision by the Comptroller's office. The letting of the contract is within the sole discretion and is the sole decision of the Commissioner, but he normally takes into consideration the advice and recommendation of his engineers. Emergency contracts are used when, as in the Jerome Park situation, the job is too large for the Department, the scope and method of work are not fully determinable, and the operation must be performed within a limited amount of time, that is to say, in the Winter of 1966-1967, so the reservoir could be back in service in the Spring of 1967. Accordingly, in the Spring and Summer of 1966, discussions and consultations occurred within the Department concerning the best method to be used and the best contractor to do the job.

Marcus, meanwhile, in April, 1966, purchased 2,000 shares of Xtra stock at an average cost of about one hundred dollars a share. He purchased the stock on margin, which meant that he had to put up only a small portion of the purchase price in cash and the balance would be financed by the brokerage house, in this case Koenig & Co.

Shortly after the purchases, the stock went down drastically, falling to the low eighties. Koenig & Co. called repeatedly for more money to cover the stock purchases. Itkin had invested $6,000 of his wife's money in the stock and Marcus turned to him for advice. Itkin suggested that he might be able to obtain some money from Motto. So Itkin visited Motto at his office in Long Island City, told him that Jim wanted help on stock he was buying, and asked for a $25,000 loan. Motto replied that he might

make the loan but wanted to be sure that Marcus would "play ball" with him and also that he would retain Charles Imperial in his position in the Water Department. Itkin, later that day or the next, phoned Marcus and repeated the conversation, asking if Marcus would retain Imperial and "Do you want to play ball in the City?" Marcus agreed: "Okay, get the money from him."

When Itkin called Motto back, Motto said he could lend only $20,000, not 25, and wanted to see Marcus before he did so. They arranged a meeting in Motto's car on 46th Street, between Madison and Fifth, where Motto usually picked up his wife in the late afternoon after her work. At the meeting, which was in April, Marcus agreed to retain Imperial, assured Motto that the stock would go up, that the profits on it would be shared with him, and that he would "play ball." The money was not passed at that meeting but Itkin later received $12,000 from Motto, which represented a payment of $12,500, with interest deducted in advance. Itkin passed it on to Marcus who deposited it in his Koenig account, in the third week in April, 1966. The $7,500 balance of the loan was received and deposited in May.

Motto had told Itkin about the Jerome Park Reservoir in April and Itkin, in mid-May, casually mentioned it to Marcus. Marcus was surprised: how did Itkin know about it? Itkin replied that it was all over the street and rumored to be a contract larger than a million dollars. They then discussed it a bit in general terms. Motto, however, kept after Itkin, trying to arrange for the handling of the contract. When this was reported to Marcus he understood it to mean "that he (Motto) would find a contractor or

negotiate with a contractor and there would be a kickback." Late in May Motto told Itkin:

> Look, I did the job, I got you the 20,000. Now there is a big emergency contract in the City of New York and Carl D'Angelo, Jr. is pushing me to get it for him. I would like to make sure that Jim is going to do this for us because this is our first big one and it is the biggest that was ever given out.

And he said that if Marcus would go along, he would introduce Itkin "to someone higher up." Shortly thereafter, Itkin went back to Marcus. Marcus wanted to delay and hold up Motto since Motto had been slow in delivering the balance of the loan. When Itkin said they could not hesitate, Marcus gave his agreement. Itkin relayed this to Motto.

Very late in May, and late at night, Motto took Itkin to the Pancake House in Queens and there introduced him to Corallo. Corallo was with some other people so, as he got up to leave, only said "I am glad you are going to work on the contract with us, we will get together in a few days."

A few days later, but still in May, 1966, Itkin and Motto met with Corallo again at a diner in Queens. Corallo announced they were going to use Joe Pizzo as the negotiator, "Pizzo is going to handle it with Fried." And, he explained, this was "Henry Fried of McKay Construction," that Pizzo was his labor relations consultant and "they have been in many deals together." Corallo asked how much Marcus and Itkin wanted and Itkin replied that he would have to talk to Marcus. Then Corallo left and Motto

immediately complained to Itkin that he thought he could do better and would use D'Angelo instead of Pizzo.

Itkin related all this to Marcus and emphasized that they would have to pick a figure. About two weeks later, in mid-June, Itkin and Marcus met at Itkin's office, which was at 300 Madison Avenue. They calculated they needed about $75,000 to clear their stock debt. Since they thought the contract would run about one million dollars, they chose 7½ per cent as their figure which, if everything ran according to schedule, would give them the money they needed.

Itkin then met with Corallo and Pizzo at Gian Marino's Restaurant on 59th Street and Lexington Avenue. Itkin said that Marcus wanted 7½ per cent. Pizzo said it was too high. Corallo told Pizzo to get it. Pizzo said he would try. Soon after that and still in mid-June, Motto met with Marcus and Itkin on 46th Street and reported that negotiations were going terribly, they were asking too much money, and that he, Motto, could do better. Motto also asked Marcus to come to Atlantic City for his Union Convention.

Marcus did drop by the convention on June 18, 1966. Motto and Marcus and their wives chatted. Mrs. Motto mentioned what a difficult time she was having in getting her daughter into a good school in Greenwich, Connecticut, where they lived, and she asked Mrs. Marcus if she could help. Then, after some socializing with the various delegates, Motto and Marcus went off into a corner. Motto said that things looked bad with Fried and that he could do better than Pizzo. Marcus replied that he didn't know what to say.

For the rest of June and until mid-August matters lay dormant. Itkin went out of the country for July and Marcus was on vacation in Maine during early August. Once back in the City, Marcus and Itkin met with Motto, in the third week in August, at the Chambers Street Restaurant in Queens. Motto suggested that they were asking too much money and that they should consider coming down. Late in August, Marcus lunched again with Motto but without Itkin and Motto again said he could do better than Pizzo in handling the negotiations. Motto related how well and how long he had known Fried, how they both shared an interest in horses, and how Fried had been "doing contracts" for a long time.

In early September, Motto, Itkin and Corallo met at the Pancake House in Queens and at the Loren East Restaurant in Manhattan to discuss the progress of the negotiations. Itkin learned for the first time at these meetings that Corallo and Motto were seeking 7½ per cent for themselves in addition to the 7½ per cent for Marcus. This, Corallo and Motto said, was too much, the price had to be lowered. Itkin complained, "Tony, I didn't think you were going to ask for the same amount. It is the Commissioner who is doing it and we want them to work for us." Motto replied:

> Listen, the guy that picks up the green should get 15 per cent for himself, and that is Pizzo, so there is nothing too much that you are asking. You come down. Why don't you talk to the Commissioner and see whether he will reduce it.

Itkin agreed to talk to Marcus but predicted he would be unhappy with it. Itkin relayed back the message from

Motto and Corallo that they settle upon a smaller amount. Marcus, however, was concerned with his financial position. The price of Xtra had dropped to the low 40's and Marcus was getting calls from Koenig seeking more money for the margin account. In addition, he was considering purchasing more Xtra to lower his average in the stock. Marcus suggested to Itkin that he ask if Corallo would lend him ten thousand dollars and if so, he would consider coming down.

On the morning of September 27, 1966, Marcus was sworn in as Water Commissioner. That afternoon he went over to see Itkin and Itkin said he was going over to the Loren East to see Corallo. He suggested that Marcus call there in a few minutes to see if the coast was clear. When Itkin arrived, he found Corallo and Pizzo seated with Armand D'Angelo who had been Water Commissioner in the Wagner Administration. Armand is the father of the Carl D'Angelo, Jr., a lawyer, named in the indictment as a co-conspirator. When Marcus phoned, Itkin told him to come over. As he arrived, he was met by Itkin near the hatcheck room. Marcus hesitated about going in when he saw D'Angelo. To delay, he made a few phone calls and as he finished, he saw D'Angelo leaving. Marcus and D'Angelo exchanged greetings and D'Angelo wished Marcus well in his new job. Marcus then went in and joined Pizzo, Corallo, whom he recognized as the man he had met in December at the diner near Motto's office, and Itkin at a new table.

Corallo stated they were asking for too much money, the price had to come down. Marcus replied that he did

not know they had been seeking 7½ per cent on top of his share. Then he inquired about the loan. Corallo said if they came down, he would make the loan and that he thought there was going to be a deal. Itkin then turned to Marcus and suggested 5 per cent, a figure they had previously discussed between themselves. Marcus agreed to the 5 per cent. This meant a total of 10 per cent, instead of 15 per cent.

On September 28th, the next day, Corallo and Itkin met at 300 Madison Avenue. Corallo said the deal was dead; Pizzo had met with Fried and his brother and they just would not pay that much. Itkin suggested they try Motto who had been seeking to handle the deal all along. Corallo said "fine." Later Itkin called Motto who agreed to handle it but said that a total of 10 per cent was too much and he would handle it at maybe 5. Itkin asked why. Motto replied:

> Because Carl told me Henry Fried won't pay a dime over five. He is used to paying five and that is all he is going to pay.

Itkin told Marcus that Motto was going to handle the negotiations. Itkin then called Corallo and related Motto's advice. Corallo suggested they get together with Motto and a meeting was arranged at a luncheonette on 46th Street. At the meeting which was around the end of the month, Motto stated:

> Look, Tony, I know I can get it, and there is no doubt in my mind, but I can't get more than 5 per cent. Now, is this going to be satisfactory to the Commissioner and is it going to be satisfactory to you? What are we going to do?

Corallo replied:

> If that's the best you can do, that's the best you can do, and the Commissioner will just have to go along with us.

Itkin then asked whether Marcus would get his loan if he went along at 5 per cent. Corallo said yes.

Early in October, Itkin told Marcus that he would have to come all the way down. Marcus inquired whether he would get his loan still and demanded that he get 3 per cent and the rest could share the remaining 2 per cent. When he got an affirmative answer, he agreed to the new and final total of 5 per cent. Itkin next went to the Loren East Restaurant to meet Corallo. Itkin said that the Commissioner was agreeable to the 5 per cent and asked if Corallo had the loan money with him. Corallo asked whether Itkin was sure the Commissioner would agree. When he said yes, Corallo handed the money to Itkin in an envelope. Itkin then called Rappaport at the 300 Madison Avenue office and told him to come over and pick up the money since Itkin was leaving on a trip and did not want to take the cash with him. Corallo was wary of this arrangement but acquiesced.

Meantime Marcus was experiencing pressure on behalf of Grand from another source. Vincent Albano, Republican County Chairman for New York County, had been suggesting Grand and Fried since early in the fall. In response, Marcus had suggested to Albano that Fried send a letter to the Department listing Grand's qualifications and equipment. On September 7th Grand sent the letter. In mid-October, Albano called again and suggested that

Marcus come to his suite at the Hilton Hotel to meet Fried and have a drink with him. Marcus did and was introduced to Fried with a comment by Albano that Fried had always been a heavy contributor to the Party and he, Albano, would appreciate any work that could be given to Fried. He repeated, he would be very appreciative.

Albano was not, however, the only Republican interested in the contract. Joseph Ruggiero, an official of the New York County Republican Party, had approached Marcus early in the fall and suggested that Oakhill Construction Company be considered for the job. Although it was not specifically mentioned at first, Marcus assumed that they also were offering a kickback. Ruggiero had followed up his suggestion with several phone calls. Although Marcus knew that some people from Grand had appeared at the Water Department on October 11th and that Groopman had suggested Grand was the best qualified contractor for the job, still, to keep the field open, Marcus told Groopman to interview some additional firms.

Towards the early middle of October, Itkin returned from his trip to find that Marcus needed more money to cover a purchase of another 2,000 shares of Xtra stock. In about the third week in October Marcus suggested that they bring in Corallo again, but this time as an investor for an additional $10,000. Itkin said he would talk to Corallo about it. When he called Corallo, Corallo wanted to know first whether they had a deal. To check, Itkin called Motto at his home in Connecticut. Motto replied he would meet them at 46th Street. A day or so later, Motto, Itkin, and Rappaport met at 46th Street. Motto said: "It's

a deal, we got it for 5 per cent. Now, all we have to do is push this." He also said that the payoff would be made all at once. On the next day, Itkin contacted Corallo to tell him the good news, but Corallo already knew. Itkin asked about the investment. Corallo indicated he would invest but wanted a 4 for 1 margin at 40 and wanted to see Marcus before he agreed. Shortly thereafter, Marcus and Itkin drove over to the Tower East Restaurant at 72nd Street and 3rd Avenue to meet Corallo. Itkin went inside, found Corallo with some other people, and after a wait took him outside. While they were walking out, Corallo said that he wanted it understood that for his $10,000 he would get $40,000 worth of stock, the 4 for 1 deal, and that he would share in the profits, if any, when the stock went up. Itkin agreed and they walked outside to meet Marcus. Corallo asked Marcus: "Well, now that we have done Jerome Park can we do some other things?" Marcus agreed. Corallo then repeated his 4 for 1 proposal. Marcus again agreed and thanked him. Corallo later delivered the money to Itkin and Marcus used it to purchase the 2,000 additional shares of Xtra. Marcus and Itkin also borrowed another $5,000 from Motto.

Relative to the split-up of the 5 per cent, Itkin, Corallo, Motto and Marcus met at 300 Madison Avenue in late October. Corallo said to Marcus: "3 for you, 2 for us." Marcus understood that to mean that he would receive 3 per cent and that Corallo, Itkin and Motto would split the remaining 2 per cent.

Marcus, however, was still considering Oakhill. On November 2nd, Oakhill's representative had come to a meeting at the Water Department. Marcus sat in and was told, after

the meeting, that Oakhill was qualified. That same day Ruggiero showed up at the Water Department and promised that if Oakhill received the award, Marcus would get 5 per cent of the price for himself. This apparently convinced Marcus, for around the 16th of November he told Groopman to prepare the letters notifying Oakhill that they were to receive the contract. Groopman in turn told Becker, his assistant, to make up the letters. Becker also called Oakhill to alert them to the job. On November 18th, the letters were typed and presented to Marcus who put the letters away in his desk until he could talk to Itkin, who was out of town.

When Itkin returned, he was first contacted by Rappaport who said that all hell had broken loose, Marcus had double crossed them by awarding the contract to Oakhill, and that Corallo and Motto had been up at 300 Madison Avenue constantly and were "wild." Itkin reached Motto one evening at his home in Connecticut and asked what was the problem. Motto was not amused:

> It's no problem, it's a complete double cross. Henry Fried just called me and told me that he found out that Oakhill was getting the contract. Now, what kind of a game are you playing? * * * You are playing with the wrong people if you're going to play this way.

Later in the week when Corallo reached Itkin, the refrain was the same. A day or two later, on November 21st or 22nd, Itkin went down to the Municipal Building to talk to Marcus. They went outside and walked around the Municipal Building. Marcus acknowledged that he was awarding the contract to Oakhill, saying he had been pressured into it. Itkin was frenzied and screaming:

> If you are talking about pressure, you're insane and you're crazy, they'll kill you before they let you get through this sort of thing, and what the heck did you take the money from both Tony and Danny if you are going to play this way.

Marcus kept walking, saying he didn't know what to do. Itkin warned him that he had better call Tony and Danny if he was going to persist in awarding it to Oakhill; if not, Itkin would call and say the contract is for Fried. Finally, Marcus gave in and said he would award the contract to Fried.

Marcus went back inside the Municipal Building. The next day he called Groopman into his office and told him to draw up the letters again, awarding the contract to Grand. He said he had to do it because of political pressure. Groopman directed his secretary to do so and called Grand to alert them. The letters were signed on that day, Wednesday the 23rd, and sent off to Grand who received them that Friday. The letters were dated the 18th because the secretary in her haste to rewrite the letters in the name of Grand rather than Oakhill had copied the date from the Oakhill letters. Itkin, meanwhile, had called Motto in Connecticut to notify him that Fried was getting the contract.

Now that the contract had been awarded, Marcus, Itkin and Corallo were eager to get the money. Marcus tried to reach Motto both at home and at his office but failed. Corallo kept pushing Itkin to contact Motto. Finally, in December, Itkin did reach Motto. Motto suggested they meet and a meeting was set for mid-December at 300 Madison Avenue. Motto, Corallo, Itkin, Rappaport and

Marcus were at the meeting. Marcus arrived late and was met outside by Itkin, who said: "Tony wants you to raise the roof with Danny and see if we can get the money." Marcus went in and demanded:

> Danny, you screamed and you yelled and you wanted your thing. Now I've done it. I've completed the contract. Where is the money?

Motto answered that Fried was very experienced, that he was hard to contact, that he could not pay the whole amount because he did not know how much the contract would amount to but he would pay 25 per cent as soon as a rough estimate could be made of the price of the entire contract. And that estimate would be made when the sludge had been lifted off the bottom. He promised that if they would agree, "Henry has told me I can ask for it and I will have it in a minute's notice." They agreed.

Later in December Itkin again came down to the Water Department to visit Marcus. He told Marcus that he had misunderstood the phrase "3 for you, 2 for us" at the October meeting. Itkin now said that the split was to be 2 per cent for Marcus, 1 per cent each for Itkin, Corallo and Motto; in other words the "you" referred to was Itkin and Marcus together. Marcus thought that this was a heck of a time to tell him but that nothing much could be done as the contract had been let. Itkin told him to relax for they had many other projects in the works.

Marcus and Itkin repeatedly tried to contact Motto in December and January as no money was produced. Marcus did reach him in Greenwich but always there was an excuse. Most often the excuse was that Fried was hard to reach.

A little past mid-January, Marcus and Itkin each found out from Rappaport that the first installment had been paid but not in a fashion likely to please them. Motto had received a payment in excess of $10,000. He had then taken something off the top and put it in his pocket, next he deducted $5,250 as repayment of his October loan with accumulated vigorish,[1] and then had deducted $4,000 as the share of himself and Corallo. This left a mere $750. When Rappaport complained, Motto gave him an additional $1,000. Thus, Rappaport received only $1,750 for Itkin and Marcus.

Soon after this initial payment, Corallo complained to Itkin that he had not received his share from Motto. Itkin kept calling and trying to push Motto but without success. Finally, in March, Corallo and Itkin received a call from Motto who told them to come over to 46th Street. They met Motto there and then he and Itkin walked over to the Hotel Roosevelt. There, in the men's room, out of a payment of $5,000, Motto handed over $3,000 for Marcus and Itkin and $1,000 for Corallo.

Towards the end of March, Corallo told Marcus and Itkin that he wanted to get out of the Xtra stock, which had gone up to somewhere in the 80s. Marcus and Itkin met with Corallo at 300 Madison Avenue and calculated that Corallo was due $18,000 on his original investment of $10,000. They then withdrew the money from the margin account and paid him.

Itkin kept pursuing Motto by phone in hope of further payments. He reached Motto in early April in Connecticut

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[1] "Vigorish" is the underworld term for usurious interest charged by loan sharks. Motto was charging Marcus 2% per week.

and Motto promised that he had a definite appointment with Fried and would come by 300 Madison Avenue afterwards. He did come by but said Fr d had been busy and couldn't see him. Corallo was angry:

> Danny, do me a favor. Call him now, will you, and tell him you're coming over. Just do me a favor.

Motto replied he was just there. Corallo repeated:

> I'm asking you to please do me a favor and call him.

Motto got on the phone, called "Carl," not Fried, and said: "I'm coming up for that thing, see that you get it." Motto hung up and said to Corallo that he would see them later. Corallo said no and ordered Itkin to go along with Motto. They went over to 50th Street and 6th Avenue where Motto made another call, asked for Carl, and said: "I'm coming up, I'm downstairs." He then went up, came down, and suggested they walk across to a coffee shop. They sat down and then Motto slipped Itkin $3,000 under the table. Itkin pointed out that Corallo was waiting for his money back at the office and so Motto slipped an additional $1,000 under the table. They Itkin went back to the office, paid Corallo and distributed the rest.

Within a week, later in April, a fourth payment was made. Motto called up, said "we're lucky," for he had received another payment and suggested they meet at 50th Street. They met there, Motto went upstairs, came down and then started driving Itkin back to his office. In the car he passed another $3,000 but this time Itkin did not ask for Corallo's share since he was not going to see him. He went back to the office. Corallo had dropped in so Itkin

told him that Motto would pay him. Itkin later notified Marcus of both payments. On April 24th, 1967, work on the reservoir was finished.

Corallo kept pushing for more money, so a meeting was set up at 300 Madison Avenue in mid-May. Corallo, Itkin, Rappaport and Marcus were there first. Corallo immediately complained that he was not receiving much money. Marcus joined the refrain by complaining of the "vigorish" that Motto had charged on the loans. This surprised Corallo who then told Rappaport to call and see if Motto was on his way. Rappaport reported back that Motto had left. When Motto walked in, he and Corallo and Itkin went into another room. Corallo ordered Motto:

> Put the money down on the table and let me explain something. I haven't been getting my share. I've laid out a lot of money in other things. I want it off the top now.

Corallo took off a sum of money and then bickering ensued about distribution of the rest. It finally came down that the share of Rappaport, Marcus, and Itkin of this $5,000 installment would be $500. Itkin commented that this was insane, that Marcus was walking around outside waiting for the money, and all he could show would be $500. Motto suggested that Itkin tell Marcus they had a lot of expenses. Itkin went outside, told Marcus of the small payment. Marcus replied angrily: "Well, this is a hell of a note. That's the last deal I'm going through with these fellows." Itkin returned to Corallo and Motto, relayed Marcus' message, and urged that they were silly not to take care of him now if they wanted to do future deals. Corallo said to

Motto: "Danny, all right, you and I will each give him a hundred dollars more." Motto walked outside, found Marcus in the men's room, and said "Here, this is for you," gave him the $200 and walked out. About 10 minutes later, Itkin ran into Marcus who complained "Big deal, they gave me $200 more, I'm supposed to be thrilled." Itkin explained that Corallo had directed Motto to give Marcus the $200 because of the vigorish payments. During the end of May, Itkin continued to push for further payment. Around the end of the month, Itkin reached Motto finally and Motto said that they had to meet and told him to be at Motto's office the next day. Motto took the initiative:

> You know, you're screaming for another payment, Henry Fried just showed me a little book which shows seven payoffs. Now, what are you talking about? There is very little money left for us.

Itkin replied: "Danny, that can't be. There were five payoffs. I picked it up four times, Charlie picked it up once." Motto replied:

> How would you know? You're running back and forth all over the world. Charlie probably picked up some extra payments.

Itkin replied that he was positive Rappaport had not picked up extra payments. Motto said to talk to him anyway but, regardless, there was only a few thousand dollars left.

Itkin then spoke individually to Rappaport, Corallo, and Marcus. Then the four met together at 300 Madison Avenue in mid-June. Itkin first accused Rappaport who swore that he hadn't taken anything extra. Corallo told him not to get excited but the only thing to do was to put it

on Motto at a group meeting. A meeting was arranged at a luncheonette at 45th Street and 1st Avenue and Corallo, Itkin, Rappaport and Motto met. Motto insisted that they were confused, that Fried had it all down in a little book and asked whether either Itkin or Rappaport had any records. When they said no, he replied: "Well, all right, Henry Fried must be right, he has it down in a book." Corallo interrupted: "All right, I heard enough, I'm sick, I don't want to hear another word. How much more is left?" Motto said $2500. Corallo said that $1000 had to go to Pizzo for the work he did for which he had not yet received anything, and the rest would go to the Commissioner. Motto agreed and said he would get the money from Fried. But shortly thereafter, Itkin heard from Motto that only $1600 not $2500 was due and owing. Corallo said all right but that still $1000 had to go to Pizzo and the Commissioner had to have the rest. And from then on throughout June and July and August, Itkin, Marcus and Corallo were to seek in vain for the remaining $1600.

In July, 1967, Fried phoned Marcus and invited him to have a drink. This was nothing new for throughout the Spring and Summer of 1967 Fried had called Marcus and invited him to have lunch or a drink with him. Marcus had consistently refused but this time he accepted. Fried suggested the Hotel Commodore later that afternoon. On the way there, Marcus picked up Itkin who suggested that after a few moments, Marcus should disappear and Itkin would see what Fried really wanted.

They walked in and found Fried already there. Marcus introduced Itkin to Fried as his friend and said that "anything you have to say you can say in front of him." They

sat down and Fried discussed his horse farm and then invited them to visit the farm and also to use his boat at any time and with anybody. Itkin then started describing his Dominican Republic ventures, suggesting that Fried might do some work down there and Fried said that he thought it was a good idea and would like to hear more about it. Marcus excused himself to make a few phone calls but as he left said: "Anything you have to discuss you can discuss with Mr. Itkin." Once Marcus was gone, Fried said:

> I'm a lot older than you are and you are handling your deals with the City terribly, and if you will listen to me you won't get hurt, and you are handling it very badly. First of all, there is no reason to share with these other guys, what have you got to do with these type of people?

Itkin replied that he had worked with them on labor problems for a long time, but Fried continued:

> Well, do you know that I can handle the biggest payoffs in the City, there is nobody that can handle it better than I, and I can handle a quarter of a million dollars in green at any one time if the deal is big enough.

Itkin interjected:

> Well, that's very good, Mr. Fried, but you only paid 30,000 of a $40,000 contract, and that doesn't sound very big, does it?

Fried replied that he had paid 40, not 30. Itkin allowed that the matter was confused but asked if he acknowledged that he owed $1600. Fried agreed that he did and said he

would pay it when the Comptroller gave final approval on some items and only then. Itkin was annoyed: "One minute we're talking about a quarter of a million, the next minute you don't want to pay the 1600." And he insisted that Fried would have to finish up this deal before Itkin could deal with him independently on any others. Fried said he would pay Motto within the week. Fried also mentioned that Itkin was fumbling the Consolidated Edison contract and that he had the right way of getting into Consolidated Edison. Itkin insisted they finish Jerome Park up first. Marcus came back, they exchanged pleasantries and the meeting broke up.

In early August, Itkin met again with Fried at the Commodore. Edward Orlando, another construction contractor, called Itkin to say that Fried wanted to meet with the two of them. Fried had been pushing for a cleaning contract to go to Orlando. Fried had become Orlando's silent partner on this venture to avoid the fuss that would follow if it had been revealed that two such large contracts had gone to Fried. At the meeting, they discussed this, and then Fried gave Itkin $1500 for a contract previously awarded to Orlando. Fried again brought up the Consolidated Edison contracts but Itkin insisted that Fried pay up the balance of $1600 on Jerome Park before they settled on the new matter. Fried promised that he would pay off by the opening of his breeding farm on August 20th.

That August 20th, Itkin went up to the opening of the farm in upstate New York. He saw Fried who told him that he had paid the balance. Then Fried introduced him to Carmine De Sapio and suggested that they work together

in the future. Marcus, who had been invited, did not go to the opening.

After the opening, Itkin contacted Motto. He mentioned that he had learned in a roundabout fashion that Fried had paid off. Motto wanted to know how Itkin knew, then denied receiving the money and said he would go up right away to get it. He left but the payment was not received. During the Summer and Fall of 1967, Marcus, Itkin and Corallo met several times at Itkin's apartment on East 15th Street to discuss the situation but their efforts were unavailing.

One of the investors in Conestoga had complained to the New York County District Attorney about Marcus. They had begun to investigate and had questioned him about certain large deposits in October, 1966, in his Koenig account. Marcus appeared before a state Grand Jury on December 8th and perjured himself by denying that he knew Corallo. Rappaport also was being investigated and apparently had turned over to the authorities the joint checkbook he kept for Itkin. One day when Rappaport came back from a visit to the authorities, he noticed Corallo and an associate sitting in a car in front of his office. He then went to Itkin who warned him that Corallo was mad and that he should leave town and call Itkin later in the week. Meanwhile, on December 12, Marcus resigned as Commissioner and went, with Itkin, to the FBI to give his version of the Jerome Park controversy.

Motto too found he was under investigation. In mid-November, he was served with a subpoena for the state Grand Jury. On the return date he was questioned about a purchase of stock by Itkin. The questioning was by an

Assistant District Attorney and not before the Grand Jury, but Motto was told that at a subsequent date he would be required to appear and testify before the Grand Jury. On December 15th, he was served with a second state subpoena and on December 17th he was served with the federal subpoena. The other defendants were also served with the federal subpoenas on the 17th and told to be present on the 18th of December.

At the federal courthouse the morning of the 18th, in answer to subpoenas, were Fried, Marcus, Motto, Corallo, Pizzo, Rappaport, Itkin and D'Angelo.

This detailed chronological recital of the meetings, conversations, and acts of the various appellants, as the jury might fairly have concluded from the evidence in the case, renders it unnecessary, we think, to discuss the sufficiency of the evidence to sustain the charge made in the indictment. It is clear beyond any doubt that the jury could have found the existence of a conspiracy to negotiate a deal with Fried and S. T. Grand, Inc., to the effect that, upon the award of this large contract, Fried would pay Marcus and his associates a kickback of 5 per cent of the amount paid by the City; that the conspirators reasonably anticipated the use of interstate telephone communications between the various conspirators and Motto, who lived in Greenwich, Connecticut, and in fact on numerous occasions telephone communications were effected both to and from Greenwich, Connecticut, by one or another of the participants in the conspiracy; and that the joint venture continued during the ensuing several months while the bribe money was being collected and distributed. Indeed, we do not see how the jury could find otherwise without repudi-

ating the testimony of Marcus and Itkin as unworthy of belief. Obviously, the jury did not do this, as Judge Weinfeld instructed the jury to acquit the appellants "if you do not believe Marcus and Itkin, * * * since the structure of the government's case in large measure rests upon their testimony." The active participation of each of the appellants in the scheme is also established by an abundance of proof of his own words and deeds.

Other parts of the record will be discussed later in this opinion in connection with claims by appellants, or some one or more of them, that we must dismiss the indictment or order a new trial because of certain allegedly erroneous and prejudicial rulings by the trial judge.

PART II

ALLEGED ERRORS IN THE INSTRUCTIONS TO THE JURY AND IN REFUSALS TO CHARGE AS REQUESTED.

A

Proof of Events After the Award of the Contract to Fried on November 23, 1966 Was Relevant to the Crime Charged in the Indictment.

Paragraph 2 of the indictment charged the defendants with using an interstate facility, the telephone, between Greenwich, Connecticut and New York with intent to:

> promote, establish, carry on and facilitate the promotion, establishment, and carrying on of an unlawful activity, said unlawful activity being bribery in violation of Articles 34 and 170, Sections 372, 378 and 1826

> of the Penal Law of the State of New York, and thereafter said defendants would perform and attempt to perform acts to promote, establish, carry on and facilitate the promotion, establishment and carrying on of said unlawful activity.

And as one of "the means" by the conspirators to "carry out" the scheme, Paragraph 3(j) of the indictment alleges:

> j. Defendants James L. Marcus, Herbert Itkin, Antonio Corallo, Daniel J. Motto and Charles J. Rappaport did make and receive and cause to be made and received telephone calls between New York, New York, and Greenwich, Connecticut, concerning the payments of money from defendants Henry Fried and S. T. Grand, Inc. and distribution of the same by defendant Daniel J. Motto.

As the events subsequent to November 23, 1966 were plainly the "carrying out" of the conspiracy and as the allegation of interstate telephone calls between New York and Greenwich during the period of the collection and distribution of the bribe money is unambiguous and specific, we must conclude that appellants were adequately informed that the proofs would include events subsequent to November 23, 1966.

The very cases cited by Corallo in support of his argument that all evidence of events subsequent to November 23, 1966 should have been excluded, are to the contrary. In *Kubacki* v. *United States*, 237 F. Supp. 638 (E. D. Pa. 1965), the defendants were charged with conspiring to obtain kickbacks for municipal officials in return for orders of parking meters. The award of the contracts was made before the effective date of Section 1952, but the payments were made afterwards. Defendants argued that the state

offense of bribery was completed before the effective date of the statute and hence there was no indictable offense. The District Court rejected the argument, the interstate travel

> was undertaken for the purpose of making the payoff contemplated as the *quid pro quo* for the award of the contract * * *. That conspiracy continued until the accomplishment of the last of its objects, delivery of the money and the clock. 237 F. Supp. at page 643.

Here also the payments and the use of the interstate phone to obtain them from Motto were part of the original agreement and certainly facilitated and helped to carry on the offense of bribery. And the same result, involving the effective date of the statute, was reached in *United States* v. *Wechsler*, 392 F. 2d 344 (4th Cir. 1968), *cert. denied*, 392 U.S. 932 (1968), where it was pointed out that while an indictable offense may have been committed at an early stage in the conspiracy, the conspiracy itself continues until its objects are attained, that being the completion or consummation of the crime.

Corallo argues that New York law demands that we find the offense of bribery ends with the award of the contract because that is when the "wrong done to the people is complete by the corruption of the public servant." None of the cases interpreting Section 1952 support this statement, as "Reference to the state law is necessary only to identify the type of unlawful activity in which the accused was engaged." *McIntosh* v. *United States*, 385 F. 2d 274, 276 (8th Cir. 1967). See also *United States* v. *Nardello*, 393 U.S. 286 (1969); *United States* v. *Wechsler, supra*, 392 F. 2d 344 (4th Cir. 1968); *cert. denied*, 392 U.S. 932 (1968);

and *Kubacki* v. *United States, supra,* 237 F. Supp. 638 (E. D. Pa. 1965).

Moreover, even if the New York substantive law of bribery were applicable and controlling, it is interesting to note that the New York cases give no support to Corallo's argument. Thus, in *People* v. *Gibson,* 191 N.Y. 227, 231 (1908), it was said:

> The bribe by which this influence is to be exerted may be paid in the present or in the future and after the influence has been exerted. The agreement and the receipt together constitute a single crime, and if the briber deems it safer for his purposes to postpone payment till he has secured his consideration, the consummation of the offense and the running of the statute will be delayed till that event has occurred.

B

WHATEVER MAY HAVE BEEN ITKIN'S CONTACT WITH THE FBI NOTHING IN THIS RECORD SUPPORTS APPELLANT'S CLAIM THAT HE PARTICIPATED IN THE CONSPIRACY AS A GOVERNMENT AGENT.

The path of the prosecutor in a conspiracy case is full of snares and pitfalls. As the conspirators run for cover a favorite diversionary tactic is to spread confusion by pursuing disgressions suggested by proof having only a tangential bearing on the case. Just such an opportunity presented itself when a reference was made to the fact that Itkin claimed to have had some contact with the FBI since as early as 1962.

1.

Itkin's Participation in This Conspiracy Was wholly on His Own. The Record Does Not Sustain Appellants' Claim that Itkin Participated as a Government Agent Pretending to Be a Conspirator.

Whatever Itkin's contact with the FBI may have been, William Veriker, the FBI agent referred to by Itkin as his contact with the FBI, was available and counsel for Corallo said "We will call the agent." But neither he nor any of the other counsel for appellants did call Veriker or any other witness on the subject. So far as the subject has any relevance to the case, the only pertinent question is whether there was any evidentiary basis for appellants' contention that Itkin's participation in the conspiracy charged in this case was as a Government Agent, in co-operation with the FBI, to help appellants to provide proof of their guilt. On this subject Itkin's testimony is explicit and clear:

> The Court: Were you engaged in this on your own, the Jerome Park Reservoir? That was your own activity, was it not?
>
> The Witness: Yes, sir.
>
> The Court: You were acting on your own there as a participant?
>
> The Witness: Yes, I was.

Q. You were doing this in order to turn the information over to the Government, is that correct? A. No.

Itkin never deviated from this position.

It is interesting to observe how the individual participants in the conspiracy endeavored, each in his own par-

ticular fashion, to gain some advantage from Itkin's contact with the FBI, whatever it may have been. Itkin used it as a sort of anchor to windward throughout. Doubtless it helped him persuade the prosecutor to consent to a severance as to him. He claims he revealed all to the FBI in July, 1967, after the last payment had been received from Fried and the conspiracy was in effect over. In any event he pocketed the money, and it is something of a coincidence, as pointed out in summation by counsel for Rappaport, that Itkin should have waited until the state Grand Jury had begun its investigation, and the District Attorney of New York County was hot on his heels, to decide to tell all to the FBI.

If Rappaport had been working in an indirect sort of way with Itkin for the purpose of ultimately revealing the Marcus bribery conspiracy to the FBI, he could have taken the witness stand in his own defense and told his story. But he did not. Instead, Rappaport's counsel conducted a prolonged cross-examination of Itkin, called the witness Reiburn, who testified about the attempted purchase by Rappaport in May and July of 1967 of a tape-recorder, and finally called as a witness a former office associate who gave some vague testimony to the effect that Rappaport explained his neglect of some negligence cases by saying he was working on "something connected with the public interest and we are doing the right thing." This same lawyer also testified that Itkin came into the office in December, 1967 and said, with reference to Rappaport, "I don't know where he is. He must be talking to the District Attorney." Perhaps this indirect approach on the bias helped to convince the jury that Rappaport was not

guilty. It is just as likely that the verdict exonerating Rappaport was based on his youth, on the fact that the indictment did not charge him with receiving any part of the bribe money, and on the claim of his counsel that he had been the innocent dupe of Itkin. We cannot see, as appellants argue, how any of this testimony substantiates the claim that Itkin was only a pretended and not a real co-conspirator.

Corallo and the other appellants use Itkin's reference to the FBI in a variety of ways. Their principal contention is that Itkin was not a conspirator at all but only a Government Agent pretending to be a conspirator. From this premise, apparently urged as matter of law, it is argued that it was error to describe Itkin as an accomplice and that it was error not to strike from the record Itkin's testimony of the hearsay declarations of Marcus and appellants as co-conspirators. As appellants did not choose to call anyone from the FBI as a witness, there is no testimony to support appellants' assertion that from first to last Itkin was working with the FBI and under the directions of the FBI in order to help appellants to commit the crime charged in the indictment. The testimony of Itkin on the point, as quoted above, is that whatever else he might have been doing with the FBI to uncover the machinations of the underworld, he was in this venture entirely on his own and acting wholly without the knowledge of the FBI until he found it to his interest to tell the FBI, after the last installment of the bribe had been paid.

It will serve no useful purpose to discuss the various arguments in detail. We find no concessions by the prosecutor that support the basic contention that Itkin func-

tioned not as a conspirator but as a Government *Agent Provocateur*. Typical of the remaining bits and scraps is a quotation from a statement by Itkin when he was engaged in vilifying the FBI for not furnishing protection for the children of his first wife. In his statement, as written down by the FBI, Itkin said he "was pulling out" and was "going to make a real stink about this whole FBI deal" and "How I enticed and entrapped not only Marcus and Rappaport but how I enticed several of the others." Itkin said he lied about Rappaport and as he denied any activity as a Govenment Agent in the formation of and carrying out of the conspiracy, it is plain the statement has no probative force with respect to any of the issues in the case except that of Itkin's credibility.

Thus we conclude it was not error for the trial judge to refuse to exclude or strike out Itkin's testimony on the ground that he was in fact a Government Agent and only a pretended participant in the commission of the crime.

2.

The Request for Instructions on the Subject of Entrapment Was Properly Denied.

It is assigned as error by Fried that the trial judge refused to instruct the jury on the subject of entrapment. As the record is replete with proof of other kickbacks participated in by Fried and of a number of other new contracts he had in contemplation, it is difficult to picture Fried in the role of an innocent lamb, without any propensity to wrongdoing. And any theory of entrapment

flies in the face of Fried's testimony of how he lay awake frightened by Pizzo's threats of what might happen to Fried if he did not pay the "finder's fee" demanded by Carl D'Angelo and how, at a time when Corallo, Motto and Itkin were engaged in a dispute as to whether Fried had made pay-offs aggregating $30,000 or $40,000, Fried answered Itkin's question "What did you pay on that Jerome Reservoir" by saying "$40,000." Despite Itkin's statement about how he "enticed Marcus and Rappaport and several of the others," the idea of entrapment in the context of the evidence in this case is absurd.[2]

3.

The Trial Judge Properly Charged That in Prosecutions in Federal Courts for the Commission of Federal Crimes the Testimony of an Accomplice Requires No Corroboration to Sustain a Conviction.

As part of his instructions on the subject of the credibility of the witnesses, Judge Weinfeld said:

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[2] On the subject of entrapment Judge Weinfeld ruled:

> The Court: That was a statement which he (Itkin) explained at the time. The fact of the matter is that the evidence is clear beyond any question in the Court's view that this was an independent venture of his own, that he participated on his own, it was not initiated by the government in any respect, and that it was after the entire transaction was over that he informed the government as to the nature of the transaction.
>
> I find no basis of any kind to the claim of entrapment. The evidence is clear on it. The fact he informed with respect to other transactions during this particular transaction does not lead to entrapment of anybody here.

> The law does not prohibit the use of informers, but whether you approve of their use is not to enter into your consideration of this case. In certain types of crime the government, of necessity, is frequently compelled to rely upon the testimony of accomplices, persons with criminal records, or informers. Otherwise it would be difficult to detect or prosecute some wrongdoers, and this is particularly true in conspiracy cases. Often it has no choice in the matter. It must take the witnesses to the transactions as they are.
>
> There is no requirement in the Federal Court that the testimony of an accomplice, an informer, or one with a criminal record be corroborated. A conviction may rest upon the uncorroborated testimony of such a witness if it is found credible and reliable. However, the testimony of such a witness should be viewed with great caution and scrutinized carefully.
>
> The fact that Itkin is an informer, as well as the fact that he and Marcus are accomplices, that Marcus has a criminal record and has admitted perjury and other state crimes, the fact that Itkin has admitted acts of criminal conduct and other moral derelictions, should be considered carefully by you as bearing upon the credibility of each.

These instructions are claimed to be erroneous in two respects.[3] First, it is said that Itkin was not an accomplice but a Government Agent only pretending to be an accom-

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[3] The requests to charge are so crudely drawn that they do not raise the point argued in Corallo's brief, that "the court refused defendant's request for an instruction requiring the jury to acquit unless there was corroboration of accomplice testimony." No such request was submitted and Request No. 24 is merely to the effect that under New York law the testimony of an accomplice must be corroborated. We discuss the alleged error, however, for the guidance of trial judges in future cases, as the question is likely to arise again.

plice. We reject this claim for the reasons we have already discussed. Second, it is the contention of appellants that the New York State rule requiring corroboration of an accomplice should have been applied, because the conspiracy was alleged to be one to use an interstate facility to carry on bribery under New York State law. Judge Weinfeld applied the federal rule and we agree with him.

The broad purposes of this statute are clearly stated in *United States* v. *Nardello, supra,* 393 U.S. 286 (1969). The reference to "bribery * * * in violation of the laws of the State in which [it is] committed" is to the substantive offense. To hold that the federal court in which a defendant is tried on a criminal charge of violating Section 1952 must apply the rules of evidence and procedure that are in force in the State where the crime was committed would clearly be giving the statute "an unnaturally narrow reading." The conduct of criminal trials in the Courts of the United States is governed by the Federal Rules of Criminal Procedure and by rulings of the federal courts in matters of procedure and practice not explicitly or by clear implication covered by these Rules. Federal law does not require corroboration of accomplice testimony to sustain a conviction. *Caminetti* v. *United States,* 242 U.S. 470, 495 (1917); *McCullough* v. *United States,* 403 F. 2d 1013, 1015 (9th Cir. 1968); *United States* v. *Carrique,* 316 F. 2d 186, 187 (2d Cir. 1963); *United States* v. *Agueci,* 310 F. 2d 817, 833 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963).

C

THE REQUESTS TO CHARGE ON THE SUBJECT OF EXTORTION WERE PROPERLY DENIED.

Corallo seems to argue that it was Marcus who extorted money from Corallo and Fried. Of course, there is no such proof. There is proof by Fried that D'Angelo and Pizzo extorted $40,000 from Fried by threats of violence to his person. But neither Rappaport nor any of appellants other than Fried testified in his own defense. Marcus and Itkin testified to the bribery conspiracy and Judge Weinfeld in considerable detail told the jury that they could not convict appellants unless they believed Marcus and Itkin, and found established to their satisfaction beyond a reasonable doubt that appellants and each of them had participated in a conspiracy to violate the New York State bribery laws in a manner which reasonably contemplated the use of interstate telephone calls. In the face of this record, and in view of the complete failure of Corallo to make any such fantastic claim during the progress of the trial, we think there was no occasion for Judge Weinfeld in his instructions to mention the subject of extortion, except in connection with Fried's testimony concerning the extortion allegedly practiced upon him by D'Angelo and Pizzo. These instructions were given and we hold them to be wholly unexceptionable.

At the close of the Government's case counsel for Corallo, in support of his motion for a judgment of acquittal, did claim that what he calls "the defense of extortion" was established as matter of law. *A fortiori,* and for the reasons above stated, this motion was properly denied.

The requests for instructions to the jury are a motley lot. They are filled with ambiguities, erroneous statements of law and argumentative matter. It is pertinent to recall our admonition, in *United States* v. *Kelly,* 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966): "it is not the function of the trial judge to put lengthy, confusing or inaccurate requests for instructions through a winnowing or sifting process in an endeavor to select what is good and reject what is bad." And the very important corollary is: if the judge's charge is comprehensive and accurate "it is not error to refuse to repeat substantially the same or a different statement of the same principles of law in the language submitted by counsel." *United States* v. *Kelly, supra,* 349 F. 2d 720, 760 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966).

In this case Judge Weinfeld's instructions cover every phase of the case comprehensively, the review of the evidence produced by both the Government and the defendants is a model of accuracy and helpfulness to the jury, despite appellants' claims to the contrary, and we find no merit in the contention that there were numerous errors requiring a reversal of the judgment of conviction as against any of the appellants.

PART III

AFTER CONSIDERING "ALL THE EVIDENCE IN THE CASE" THE JURY WAS WARRANTED IN FINDING THAT FRIED AND GRAND PARTICIPATED IN THE CONSPIRACY WITH REASONABLE ANTICIPATION THAT THE INTERSTATE TELEPHONE WOULD BE USED BY THE CONSPIRATORS OR SOME OF THEM TO EFFECT THE PURPOSES OF THE CONSPIRACY.

Fried claims that there must be direct evidence that Fried made some of the telephone calls to Greenwich, Connecticut, or at least direct proof that he knew that Motto's home was in Greenwich. The basic fault in the reasoning of Fried and Grand lies in their misinterpretation and misapplication of the requirement that Fried's participation in the conspiracy must be established by his own words and deeds and not by the declarations of the other conspirators. Ever since the writing of Judge Learned Hand's opinion in *United States* v. *Dennis,* 183 F. 2d 201, 230-1 (2d Cir. 1950), affirmed, 341 U.S. 494 (1951), this Court, in a long series of opinions[4] has sought to lay to rest the erroneous supposition that in a joint conspiracy

[4] *United States* v. *Ragland,* 375 F. 2d 471 (2d Cir. 1967), *cert. denied,* 390 U.S. 925 (1968); *United States* v. *Padilla,* 374 F. 2d 996 (2d Cir. 1967); *United States* v. *Nuccio,* 373 F. 2d 168 (2d Cir.), *cert. denied,* 387 U.S. 906 (1967); *United States* v. *Stadter,* 336 F. 2d 326 (2d Cir. 1964), *cert. denied,* 380 U.S. 945 (1965); *United States* v. *Borelli,* 336 F. 2d 376 (2d Cir. 1964), *cert. denied sub nom. Mogavero* v. *United States,* 379 U.S. 960 (1965); *United States* v. *Stromberg,* 268 F. 2d 256 (2d Cir.), *cert. denied sub nom. Lessa* v. *United States,* 361 U.S. 863 (1959).

trial the proof sufficient to establish the participation of a defendant in the conspiracy is the same as the proof sufficient to carry the case to the jury as against that same defendant. Proof of the participation of a particular defendant in the conspiracy must be by his own words and acts because such evidence alone will suffice to establish the agency relationship required to warrant the trial court's submission to the jury of all the evidence bearing on the guilt or innocence of a particular defendant, including the declarations of the various persons shown to be co-conspirators.

We have already discussed the abundance of evidence of Fried's own words and deeds that was more than sufficient to warrant a finding that he was a participant. It will serve no useful purpose to add to what we have already said on this subject. We turn then to a consideration of what the whole record, including the declarations of co-conspirators, discloses as Fried's knowledge of the likelihood of use of the interstate telephone service to and from Motto's Greenwich home by Motto and the other co-conspirators.

Motto was the key man in the conspiracy. It was he who suggested the kickback idea to Marcus in the first place. It was Motto who finally persuaded the others to let him do the negotiating with Fried. It was Motto who arranged for the services of D'Angelo and it was he who acted as the distributor of the various successive instalments of the bribe as they were paid by Fried. That the operations of the conspiracy required secrecy and caution is evident from the different diners, luncheonettes, restaurants and other places in cars or on street corners, often at

night, as the prolonged negotiations finally produced agreement on the 5 per cent and the shares allotted to Marcus, Itkin, Motto and Corallo. There were also numerous meetings at various places, attended by varying groups of the conspirators, as the payments were received and passed around, always in cash. The use of the telephone was necessarily almost constant and prolonged. The record is replete with proof of a large number of interstate calls to and from Motto's home in Greenwich where Motto maintained a telephone with an unlisted number. Motto gave this unlisted Greenwich number to Marcus. Itkin, who had worked with Motto on other matters at an earlier time, also had Motto's unlisted number. It is not disputed that Fried also had "a private wire."

Motto also had known Corallo previously and it was he who introduced Corallo to Marcus and Itkin. All these friendships had been formed before the Jerome Park Reservoir question arose. As the whole venture revolved around Motto so it is reasonable to expect that the interstate facilities would be used to keep in touch with Motto, the originator and the moving spirit behind the whole scheme.

Moreover, we think the extensive references in the record to interstate telephone calls that were actually made justify the inference that the use of interstate telephone calls was not a casual and incidental occurrence but the fulfillment of an integral part of the conspiratorial consensus. We do not see how the jury could have found otherwise, considering the extensive evidence of the disputes not only during the period of negotiation, but also over the time, size and split-up of the pay-offs. It was necessary to keep

in touch with Motto to resolve these disputes, and, given the familiarity of the conspirators with Motto, there was sufficient evidence to justify the inference that the conspirators agreed to use the interstate telephone, or reasonably expected to use it in furtherance of the ends and purposes of the conspiracy.

Was there knowing participation by Fried in this conspiracy? Under the authorities to be discussed shortly, this depends upon the degree of participation by Fried and the extent to which he was intimate and on familiar terms with the other conspirators, especially Motto. The greater Fried's involvement in the complicated operations of the scheme and the payment of the various instalments of the pay-off and the greater his intimacy with Motto, the more reasonable is the inference that Fried knew the interstate telephone service would be used or actually was used.

In August, 1966, Motto lunched with Marcus and Itkin and once with Marcus alone. At both these meetings, and especially at the luncheon with Marcus alone, Motto went on and on about how well he knew Fried, how they shared an interest in horses and how "he had known him for a long time, he was a man that had been doing contracts for a long time, over a period of years."

In November, 1966, when Marcus decided to award the contract to Oakhill, Fried called Motto directly to complain of the switch. When Itkin reached Motto in Connecticut to find the source of the trouble, Motto said:

> It's no problem, it's a complete double cross. Henry Fried just called me and told me that he found out that Oakhill was getting the contract.

Similarly, there is much other evidence of continuing direct contacts between Fried and Motto throughout the record. At the mid-December meeting, for example, where Corallo, Itkin and Marcus tried to push Motto for the payment of the money, Motto responded by relating how experienced Fried was, how hard he was to contact, and how he had promised to make a payment of 25 per cent once a rough estimate was made. He said:

> Henry has told me I can ask for it and I will have it in a minute's notice.

Fried himself admits that he, D'Angelo and Motto spent a day together in late Spring of 1967, driving up to Fried's horse farm and talking to one another for the whole day. This indicates more than a casual or incidental friendship.

Soon after that, towards the end of May, when the dispute over the amount remaining reached a high point, Motto again indicated that he had seen Fried directly. Motto told Itkin:

> You know, you're screaming for another payment, Henry Fried just showed me a little book which shows seven payoffs. Now, what are you talking about? There is very little money left for us.

And a few weeks later, when Motto again met with Itkin and also Corallo and Rappaport, he repeated that Fried had it down in a little book which he had seen.

In July, 1967, when Fried, Itkin and Marcus met at the Commodore on Fried's invitation, Fried, Itkin testified, kept saying how badly the deal was being handled and how there was no reason to work with Motto and Corallo.

When Itkin had pressed for the balance due before discussing other deals, Fried replied:

> All right, I'll pay Danny Motto the money back within a week.

In August, 1967, when Itkin, Orlando, and Fried met again at the Hotel Commodore, Fried again promised to pay the balance due to Motto—but now the final payment is to be made by the opening of the horse farm on August 20th. And at the opening, Fried said that he had "finished up with Danny."

On December 18, 1967, the various conspirators were summoned to the Federal Grand Jury. On that date Fried made several statements which showed his knowing association with the conspiracy. Marcus saw Fried outside the Grand Jury room, near the elevators, and Fried said to him:

> They are on a fishing expedition, they haven't got anything on us.

Itkin testified also that Fried spoke to him in the anteroom to the Grand Jury and that he had been cautioned by Fried:

> They'll never get anything on us if we all shut up.

And later that day, while they were waiting in line to be fingerprinted, Marcus testified that Fried said to him:

> They haven't got anything on us. If we all keep quiet, we will be all right.

Fried's counsel misread the purport of *Crimmins* v. *United States*, 123 F. 2d 271 (2d Cir. 1941) and *Twitchell* v. *United States*, 313 F. 2d 425 (9th Cir. 1963), *vacated* and

remanded sub nom. Rogers v. *United States,* 376 U.S. 188 (1964) (vacated for reconsideration on substantive counts only). These cases distinguish between cases where it is held that a peripheral conspirator, having no knowledge of the operations of the conspiracy as a whole, cannot be convicted without proof indicating some knowledge on his part of the interstate features of the venture, and other cases, such as the one before us now, where the totality of the proofs, including testimony of declarations and acts of co-conspirators in furtherance of the illegal scheme, reveal the appellant as one who was right in the thick of things as a central member, manipulating and closely supervising the carrying out of the principal object of the conspiracy. In this type of case the proofs are held to be sufficient if the evidence warrants an inference that the particular defendant directly agreed to a scheme in which it was known that the likelihood of use of interstate telephone calls was great. As aptly said in *Twitchell* at page 429: "The degree of knowledge required of the interstate aspect thus increases as the defendant's connection with the core agreement becomes more tenuous." Here the proof of Fried's "connection with the core agreement" is overwhelming. There is nothing tenuous about it.

PART IV

THE CONDUCT OF THE TRIAL

A

THE GRAND JURY TESTIMONY OF FRIED AND MOTTO WAS PROPERLY RECEIVED AND IT WAS NOT AN ABUSE OF DISCRETION TO DENY THE MOTIONS FOR A SEVERANCE.

I

Some time ago, and consistently over the years, the Supreme Court has instructed trial judges in no uncertain terms to give clear and explicit limiting instructions during the trial of joint criminal conspiracy cases, so that the jurors would understand those instances where certain evidence is received only as against certain specific defendants and with respect to certain specific issues. *Blumenthal* v. *United States,* 332 U.S. 539, 559-60 (1947). We find not the slightest indication in *Bruton* v. *United States,* 391 U.S. 123 (1968) that the use of such limiting instructions is to be abolished or curtailed, except in the context of the overruling of the Court's former holding in *Delli Paoli* v. *United States,* 352 U.S. 232 (1957), that is to say, in cases where a co-defendant's confession implicating another defendant in the commission of the crime, is received with limiting instructions even though the co-defendant making the confession does not testify and thus afford the confrontation required by the Constitution.

In this case Judge Weinfeld, an able and experienced trial judge, followed the teaching of *Blumenthal* to

the letter, and, in our judgment, made his limiting instructions "impregnable." A prime example is his treatment of the testimony of Fried and Motto before the Grand Jury. These two appellants gave no testimony that could even remotely be considered as involving any of the appellants in any wrongdoing whatever, much less as indicating that they or any of them participated in the conspiracy as charged. What Motto and Fried did before the Grand Jury was to tell a variety of brazen lies[5] that served their purpose to conceal their participation in the course of events. It is not contended that any of the other appellants had anything to do with this perjury or that they were in any manner involved in it.

Accordingly, Judge Weinfeld, both at the time this Grand Jury testimony of Fried and Motto was received, and in his instructions to the jury at the close of the case, told the jurors, in the most specific and emphatic manner, that this testimony was received only as against Fried and Motto, respectively, on the issue of the intent of each of these two, separately, and that the jurors must under no circumstances consider any part of this testimony in their determination of the guilt or innocence of the other defendants. This is a far cry from such situations as were presented in *Delli Paoli* and *Bruton*.

We think this Grand Jury testimony was properly received and that there was no abuse of discretion by Judge

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[5] Motto denied having anything to do with the pay-off and Fried denied paying money to anyone. Fried said he never heard of Corallo and Motto testified that, except for chance encounters, he had known Corallo only years ago when they grew up in the same part of town.

Weinfeld when he denied Corallo's motion for a severance. The distinction between this case and the denial of the motion for a severance by appellant Shuck in *United States* v. *Kelly, supra,* 349 F. 2d 720 (2d Cir. 1965), *cert denied,* 384 U.S. 947 (1966), which we reversed, is of critical importance. In that case voluminous testimony given before the SEC by the principal defendants was entirely devoted to the excoriation of Shuck and a series of accusations that Shuck was the source of various false and fraudulent representations made in connection with his sale of the stock. It took hours to read all this testimony to the jury. None of it was admissible against Shuck, and we found it difficult to see any reason for admitting the testimony at all, as it accomplished no other purpose than to accuse Shuck of misconduct. Moreover, the limiting instructions were of the most perfunctory sort.

Corallo's motion for a severance, made prior to the trial, and based upon what it was feared Rappaport would testify, fell of its own weight when Rappaport gave no testimony at all. In any event, the motion in so far as it referred to Rappaport was wholly lacking in substance. We shall not again refer to the severance feature of the case. All of the appellants were properly joined as defendants and nothing occurred during the trial to require a severance as to any of them.

It is said by some or all of the appellants that the calling of these men to testify before the Grand Jury was mere pretense and a measure of harassment, in order to obtain damaging admissions. If we put ourselves in the position of the prosecutor at the time the subpoenas were served on December 17, 1967, returnable at the United States Court-

house on the morning of December 18, it was apparent from the *ex parte* statements of Marcus and Itkin that the prosecution was dealing with a long, devious and complicated conspiracy, full of scheming and trickery. There had already been a certain amount of running to cover by the various co-conspirators. No investigation would be adequate and in any sense complete without at least an effort to glean some small harvest of information from those suspected of being involved. The prosecutor had by no means wholly developed his case. This was not a case of pressure upon some single, indigent and perhaps ignorant person. All of those who were summoned were sophisticated people, with varying motives to save themselves at the expense of some of the others, if they could, and possessed of information of importance to the prosecution. Several of them were lawyers. Those present were: D'Angelo, Rappaport, Fried, Motto, Corallo, Pizzo, Marcus and Itkin.

Under these circumstances we see no reason for the curtailing of the investigatory powers of the Grand Jury. Indeed, the cases in this Circuit uniformly approve the procedure that was followed here. *United States* v. *Wolfson*, 405 F. 2d 779, 784-85 (2d Cir. 1968); *United States* v. *Capaldo*, 402 F. 2d 821, 823-24 (2d Cir. 1968); *United States* v. *Fortunato*, 402 F. 2d 79, 82 (2d Cir. 1968); *United States* v. *Winter*, 348 F. 2d 204 (2d Cir. 1965), *cert. denied*, 382 U.S. 955 (1965).

II

It is claimed that the warning required by *Miranda* v. *United States*, 384 U.S. 436 (1966), was not given and that the Fifth and Sixth Amendment rights of Fried and Motto were not protected.

In the Grand Jury room, Motto and Fried were separately warned that they had a right to remain silent, that the Grand Jury was investigating the offense of using an interstate facility to further the state crime of bribery of a municipal official, that each was the subject of the investigation, and that he had a right to consult with an attorney. They were also asked whether they had attorneys present. Fried said he did, Motto said he did not. Finally, they were told whatever they said might be used against them. We have set forth the full warnings in the margin.[6] These warnings were completely adequate.

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[6] Grand Jury warnings to Daniel Motto:

"Q. Please state your name. A. Daniel Motto, M-o-t-t-o.

Q. And your address. A. 121 Birch Lane, Greenwich, Connecticut.

Q. Mr. Motto, let me advise you that the grand jury before you is investigating alleged violations of Title 18, United States Code, Section 371. That section makes it a crime to conspire to commit any crime against the United States, to commit any offense against the United States.

There is also a Section 1952 of the same Title which makes it a crime to use any interstate facility or telephone or to travel, or the mails, in furtherance of certain particular State offenses. In this case the State offense that the grand jury is investigating is the offense of bribery of a local official, namely a municipal official. Do you understand that? A. Yes.

Q. And it's investigating conspiracy concerning this. I do want to advise you that you have a right to refuse to answer any questions the grand jury may ask you today the answers to which you feel they tend to incriminate you personally. Do you understand what I just said? A. Yes.

Q. However, should you answer questions, those answers could be used against you in a court of law or otherwise in the future.

[At that point the witness nodded.]

Q. You also have the right to consult with an attorney. You understand that? A. Yes, sir.

Q. Do you have an attorney here today? A. No.

Q. Let me also advise you that you are a subject of the investigation of this grand jury. Do you understand that? A. Yes, sir.

Q. How long have you lived in Greenwich, Connecticut?

Grand Jury warnings to Henry Fried:

"Q. Would you please state your full name? A. Henry Fried.

Q. Where do you reside? A. I have a city address at 301 East 66th Street, but I spent most of my time up at Somers, New York.

Q. Mr. Fried, are you the president of S. T. Grand & Company? A. I am; yes, sir.

Q. What is the nature of the S. T. Grand & Company's business? A. General Construction, pipe work; we're mostly watermain contractors, and occasionally, if my engineers see a job that they may be interested in, we bid on some structural work also.

Q. Let me advise you initially, Mr. Fried, that this Grand Jury is investigating alleged violations of the Federal Criminal Code, Section 371 and Section 1952, which in effect involves an alleged conspiracy to commit the state crime of bribery of a local official. And in connection with that, certain—use of certain interstate facilities used in connection with that crime; do you understand that, generally? A. I do, sir.

Q. I want to advise you that you have a right to consult an attorney; do you understand that? A. Yes, sir.

Q. Do you have an attorney who's sitting outside right now? A. I have sir.

Q. What is his name? A. Mr. Cassese.

Q. How do you spell that name? A. I think it's Cassese. (spells)

Q. I want to advise you also that we're going to propound questions to you, and that you have a right to refuse to answer any questions which might be asked of you where you feel the answer to the question would tend to incriminate you personally; do you understand that? A. Yes, sir, I do.

Q. In addition, any answer you do give may be used against you in a court of law in the future. You understand that? A. Yes, sir.

Motto has filed a Supplemental Appendix containing an *ex parte* affidavit by Mr. LaRossa, one of his counsel during the trial of this case. This affidavit was used in support of a motion on Motto's behalf to dismiss the indictment because, according to LaRossa's statements "on information and belief" D'Angelo was Motto's lawyer when they were summoned with the others to testify before the Grand Jury on December 18, 1967, and D'Angelo had failed to "advise Motto of his Constitutional rights with regard to testifying before the Grand Jury." We are at a loss to perceive the pertinency of this, in view of Motto's testimony before the Grand Jury that he had no lawyer.

The *Miranda* rule has no application to the circumstances of this case. It is hornbook law that witnesses called to testify before a Grand Jury have no right to the presence of a lawyer to object to questions or act as counsel. The practice of permitting counsel to sit in the anteroom to give advice if the witness so desired was followed here in the case of Fried, and Motto, as we have said, testified he had no lawyer and he made no request that he be given an opportunity to get a lawyer.

None of those summoned to appear were in custody nor were they put under any restraint. Moreover, the Grand

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Q. I also want to advise you, Mr. Fried, that you are a possible subject of this investigation; do you understand that? A. Possible subject? I'd like you to explain that, sir, if you will.

Q. That means that the allegations are such that the Grand Jury is contemplating—or, are in the process of investigating an alleged bribery of which you may be a part; do you understand that? A. I understand that.

Q. That is as clear as I can make it. A. Right.

Q. Now, you state you are the president of S. T. Grand & Company?

* * *'"

Jury proceedings were conducted under the supervision of a District Judge, who, it may be assumed, was at all times available for rulings on objections by any of the witnesses.

The plain truth of the matter is that the predicament of Fried and Motto was in no sense due to any deviation from duty by the prosecutor, but solely to the overconfidence and arrogance which led them to believe they could lie themselves out of trouble.

B

We Find Nothing Improper or Prejudicial in Certain Comments by the Trial Judge.

During the cross-examination of Groopman counsel for Fried established the fact, which so far as we can see was never seriously questioned by any of the parties, that the City's engineers regarded Grand as the best qualified contractor to do the Jerome Park Reservoir job. Nevertheless, the documentary evidence made it quite clear that Marcus went to the very brink of awarding the contract to Oakhill, another contractor whose qualifications were also approved. With what seems to us to be undue liberality the trial judge permitted a lengthy and repetitious rehearsal of what a fine construction company Grand was. Finally, counsel for Fried produced a magazine article, not written by Groopman, and at first sought to read portions of the article into evidence, but finally he withdrew the exhibit. In the course of the ensuing colloquy, the trial judge said: "* * * under the terms of the indictment as cast, it wouldn't make very much difference whether one was more qualified than the other." Later, in other colloquies, this remark was

repeated. Although the question was not raised by any proper motion or objection at the trial, we are asked to notice these comments as "plain error."

While the uncontradicted proof is that Grand was "fully qualified to perform this job," it was not and could not reasonably be claimed by Fried and Grand that no other construction company was qualified or that the job had to go to Grand. Moreover, Marcus alone had the power to award the contract, and, but for Itkin's vigorous opposition and fear of the consequences, Marcus would have awarded the contract to Oakhill.

The comments by the trial judge were fully justified and bear not the slightest resemblance to the prejudicial comments discussed in the cases cited in the main brief of Fried and Grand.

C

IN VIEW OF THE DIRECT EXAMINATION OF FRIED AND HIS TESTIMONY ON CROSS-EXAMINATION BY COUNSEL FOR OTHER APPELLANTS TO WHICH NO OBJECTION WAS RAISED ON FRIED'S BEHALF IT WAS PROPER FOR THE TRIAL JUDGE TO ASK FRIED WHETHER PRIOR TO THE TRIAL HE HAD INFORMED THE PROSECUTOR THAT PART OF HIS TESTIMONY BEFORE THE GRAND JURY WAS FALSE.

We have already discussed under the heading of Corallo's so-called Extortion Point the testimony of Fried, on direct examination, to the effect that D'Angelo and Pizzo forced him to pay D'Angelo $40,000 by putting Fried in fear for his life. Later on, in his direct examination, Fried elabo-

rated on this theme for the obvious purpose of explaining his reason for falsely stating to the Grand Jury that he had paid no money to anyone. Thus he said Joe Pizzo came up to him just before he entered the Grand Jury room and said:

> Commish, you are going into the grand jury room, and you want to make God damn sure you testify no money was passed or you are apt to find your body in an empty lot.

This was supposed to be Fried's reason for lying to the Grand Jury; and he said in effect that he had not intended to testify at the trial but changed his mind when the threat of physical injury to his person by Pizzo was removed by Pizzo's death in April, some little time before the trial commenced in June, 1968.

When cross-examined by Corallo's counsel, and without objection, Fried freely answered questions about why he had not reported the "extorsive" incident to his friend Garelik, a high ranking police official. He testified: "I did not because I was fearful of Joe Pizzo. I knew what it would mean if I did mention it."

At the close of the entire cross-examination, Judge Weinfeld interrogated Fried as follows:

> The Court: When did it come to your attention that Joe Pizzo died?
>
> The Witness: Some time in April.
>
> The Court: Of this year?
>
> The Witness: Of this year.
>
> The Court: That was about four months after you say you lied before the grand jury because of the threat?
>
> The Witness: That's right.

> The Court: After Joe Pizzo died, did you ever communicate with the United States Attorney and request that your grand jury testimony be changed to set forth the true version of what had occurred?
>
> The Witness: No, sir.
>
> The Court: After the death of Joe Pizzo, did you ever tell the United States Attorney that you had lied?
>
> The Witness: I never did.
>
> The Court: If there are no other questions, the witness may step down.

This testimony, given without objection, is claimed by Fried to be in violation of Fried's Fifth Amendment rights despite the clear waiver of such rights by Fried's testimony on direct examination.

The alleged violation of Fried's Sixth Amendment rights is an equally frivolous contention. After Mr. Donati, Fried's counsel, had called a character witness, he decided to try to soften the effect of Fried's admission that, even after the threat of violence was removed by Pizzo's death, he had not informed the prosecutor that his Grand Jury testimony was false. And so he withdrew the character witness. In a conference at the bench Mr. Donati followed the propensity he had displayed on various occasions during the trial to make improper *ex parte* comments in lieu of testimony. So, Mr. Donati proceeded to tell Judge Weinfeld that "we," meaning himself and Fried, "had a decision to make * * * and that was a lawyer's decision" with more to the general effect that he and not Fried was responsible for the decision not to inform the prosecutor that Fried's testimony before the Grand Jury was false. And this in the face of previous testimony by Fried, to which his coun-

sel made no objection, that he had made no effort to report the alleged extortion to the "authorities" and his attorneys had not suggested that this be done. Indeed, after this testimony had been given by Fried, Mr. Donati objected "to this whole line of testimony," and his objection was sustained, evidently upon the ground of the privileged relationship between attorney and client. Against this background, and without any motion, objection or effort to raise the question for appellate consideration, we find there is no alleged Sixth Amendment violation before us for decision. Viewed from any angle the claim of deprivation of Fried's right to the effective assistance of counsel is wholly lacking in substance. Judge Weinfeld's question constituted no more than a perfectly proper attempt to clarify testimony already given, without objection, by Fried.

The jury evidently found that Fried lied before the Grand Jury and that he also lied at the trial. It may well be that Pizzo's death gave Fried what may have seemed to him to be a good opportunity to invent a new version bearing some slight resemblance to the facts as testified to by Marcus and Itkin. But it strains credulity to the breaking point to picture Fried and his lawyer seriously debating together the "legal" question of whether they should let the prosecutor know in advance of the trial that Fried was going to change his story.

CONCLUSION

We have carefully examined numerous additional claims made by one or another or all of the appellants concerning alleged erroneous and prejudicial rulings and we find no merit in any of them.

And so the sorry story of the corruption of a public official comes to a close. We see politicians hovering in the background, a labor leader as the master of ceremonies and underworld characters weaving a web of intrigue in the midst of secrecy and stealth. These sinister figures chisel in on one another in the fixing of their respective shares of the loot, and finally submit to the power of one who wanted his share "from off the top." This record reeks with proof of the guilt of every one of those whom the jury found guilty as charged.

Affirmed.

APPENDIX B

Opinion of United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Indictment 67 Cr. 1051

UNITED STATES OF AMERICA,

—v.—

ANTONIO CORALLO, HENRY FRIED, HERBERT ITKIN, JAMES L. MARCUS, DANIEL J. MOTTO, CHARLES J. RAPPAPORT, and S. T. GRAND, INC.,

Defendants.

WYATT, District Judge:

This is a motion for defendants Fried and S. T. Grand, Inc. for an order suppressing for use as evidence the grand jury testimony of Fried and dismissing the indictment as against these defendants. Presumably the motion is believed authorized by Fed. R. Crim. P. 12(b)(1) and 41(e).

The ground for the motion is that, according to Fried, he was summoned to appear before the grand jury and did appear at about 10:30 A.M. on Monday, December 18, 1967; that after he left the grand jury room he was followed by government agents and was arrested at about 1:30 P.M. on the same day.

I have read the testimony of Fried before the grand jury. He was advised of the alleged violations which were being

investigated, that he was a "possible subject of this investigation", and that the grand jury was investigating "an alleged bribery of which you may be a part". He was told of his privilege against self-incrimination. He was told that he had a right to consult counsel and in this connection Fried stated that his attorney was then sitting just outside the grand jury room. It is appropriate to this extent to invade the required secrecy of grand jury proceedings in order to give the background against which the present motion is made.

The indictment was handed up on December 18, 1967, and a bench warrant was issued for the arrest of Fried. The return of the warrant was filed December 26, 1967, and shows that it was received and executed on December 18, 1967. Whether the officer executing the warrant had it in his possession at the time of the arrest is of no moment. Fed. R. Crim. P. 9(c)(1) and 4(c)(3).

The argument for the present motion is that Fried and his corporation were "de facto defendants" (Moving memorandum, p. 4) when he was questioned before the grand jury. In this connection, counsel for movants refer to the return of the indictment shortly after Fried testified; it is asserted that the return was a "mere formality" (Moving memorandum, p. 4). It is suggested that the grand jury "might" have voted an indictment even before Fried was questioned.

There is a strong presumption in favor of the regularity of grand jury proceedings and the suggestion cannot be accepted that this indictment was voted before the testimony of Fried but was not returned until after his testimony.

The argument for movants invokes *Miranda* v. *Arizona*, 384 U.S. 436 (1966) to require that a witness before a grand jury, who is himself the subject of investigation, must be allowed to have counsel present with him before the grand jury. Since counsel was not present with Fried in the grand jury room, his constitutional rights were violated, and the indictment must be dismissed. This Court declines so to extend *Miranda* v. *Arizona*.

Preliminarily it may be noted that the motion is made on behalf of the corporation, S. T. Grand, Inc., of which Fried is president. It is difficult to see how the corporation has any standing to move to suppress because constitutional rights of Fried were violated. A corporation in any event has no privilege against self-incrimination under the Fifth Amendment (*United States* v. *White*, 322 U.S. 694, 699 (1944)) and since the chief, if not only, function of counsel in the grand jury room would be to advise as to incriminating questions, no rights of the corporation to counsel could possibly have been affected here.

Preliminarily also, Fried himself has no standing to make the present motion because he never asked to have counsel present with him in the grand jury room. He was told that he had a right to consult counsel. He had a lawyer sitting just outside. He is not within the principle of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) nor of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The application of *Escobedo* depends on whether "the suspect *has requested* and been denied an opportunity to consult with his lawyer" (378 U.S. at 491; emphasis supplied). The statement in *Miranda* is that "the Fifth Amendment privilege comprehends . . . a right . . . to have counsel present during any questioning *if the defendant so desires*" (384 U.S. at 470).

Fried never "requested" that his counsel come into the grand jury room nor indicated in any way that he so desired.

Even if Fried had requested that his counsel be permitted to come into the room, the result would be the same. Rule 6(d) of the Federal Rules of Criminal Procedure specifies the persons authorized to be present while the grand jury is in session; an attorney for "the witness under examination" is not among those specified. Traditionally, witnesses before grand juries have not been permitted to have their attorneys inside the grand jury room and there is impressive authority that this violates no constitutional rights of the witness. "A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel . . .". *In re Groban*, 352 U.S. 330, 323 (1957). Counsel for movants point out that this was a five to four decision (Reply memorandum p. 3) but, as to the principle that there is no right to the presence of counsel in the grand jury room, there was no difference between the majority and dissenters, as shown by the dissenting opinion of Mr. Justice Black (see discussion, 352 U.S. 346-47). The present argument for movants was carefully considered and rejected by Judge Weinfeld in *United States* v. *Kane*, 243 F. Supp. 746, 753-54 (S.D.N.Y. 1965). See also *Directory Services, Inc.* v. *United States*, 353 F.2d 299, 301 (8th Cir. 1965).

So Ordered.

Dated: New York, New York
Mar 13, 1968

/s/ Inzer B. Wyatt
United States District Judge

APPENDIX C

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of July one thousand nine hundred and sixty-nine.

Present:

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN
HON. IRVING R. KAUFMAN,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO CORALLO, HENRY FRIED, DANIEL J. MOTTO, and S. T. GRAND, INC.,

Defendants-Appellants,

HERBERT ITKIN, JAMES L. MARCUS, and CHARLES J. RAPPAPORT,

Defendants.

Appendix C—Judgment of United States Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing

32686-9

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO CORALLO, HENRY FRIED, DANIEL J. MOTTO and S. T. GRAND, INC.,

Defendants-Appellants,

HERBERT ITKIN, JAMES L. MARCUS and CHARLES J. RAPPAPORT,

Defendants,

(and 3 other cases).

A petition for a rehearing having been filed herein by counsel for appellants Henry Fried and S. T. Grand, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ HAROLD R. MEDINA

/s/ STERRY R. WATERMAN

/s/ IRVING R. KAUFMAN
Circuit Judges

August 21, 1969

APPENDIX D

Constitutional and Statutory Provisions Involved

United States Constitution:

Amendment V

"* * * nor shall he be compelled in any criminal case to be a witness against himself * * *."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

18 U.S.C. § 1952

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

18 U.S.C. § 371

"§ 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *"

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 578

ANTONIO CORALLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, together with others, was convicted by a jury in the United States District Court for the Southern District of New York of conspiracy to violate the Travel Act, 18 U.S.C. 1952, by using the facilities of interstate commerce to commit bribery. He was sentenced to three years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed in a lengthy opinion (Pet. App. 1a–56a).[1]

Although petitioner seeks to raise the question whether an undercover agent (allegedly co-defendant Itkin), instructed to infiltrate a conspiracy, can be treated as a co-conspirator at the trial for purposes of admission of statements against all members of the

[1] The facts are comprehensively detailed in Judge Medina's opinion for the court of appeals (See Pet. App. 6a–28a).

365-542—69

conspiracy (see *United States* v. *Chase*, 372 F. 2d 453, 459–460 (C.A. 4), certiorari denied, 387 U.S. 907), that question is not squarely presented by this record. Petitioner asserts that Itkin, who had agreed to provide information about organized crime activities to the F.B.I., did not participate in the instant conspiracy as an actual member thereof but rather in his capacity as an informant. But the factual issue whether Itkin was acting for himself or for the government in the present case was resolved against petitioner both by the trial judge and by the court below on appeal (See Pet. App. 31a–35a; *id.* at 35a n. 2).

The record—which shows, *inter alia*, that Itkin never reported anything about the conspiracy to the F.B.I. until after the last payment had been received and the matter was under investigation by the State—fully supports the conclusion that Itkin was not acting as an agent in regard to the criminal conspiracy in this case (Tr. 994–998, 1377–1389).[2] There is, in these circumstances, no occasion for this Court to review the factual findings of the court below.[3]

---

[2] In quoting from the government's brief in the court of appeals that Itkin had been "an F.B.I. informant for years" (Pet. 8), petitioner fails to quote the full context in which this statement appears. That context plainly indicates that the government's position below was that Itkin had a personal stake in the illegal venture charged in this case (see government's brief in the court of appeals, p. 43).

[3] We also note that to the extent that petitioner's complaint rests on hearsay principles, it is thoroughly undermined by the fact that Itkin testified at trial and was subject to extensive cross-examination (consuming more than 400 pages of the transcript) concerning any of his extra-judicial statements that had been offered in evidence. See *United States* v. *Brill*, 350 F. 2d 171, 173 (C.A. 2), certiorari denied, 382 U.S. 973.

Petitioner's other contentions, which pertain to the instructions, are insubstantial and are fully answered in the thorough opinion of the court below, on which we rely (see Pet. App. 36a–39a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 620

HENRY FRIED AND S. T. GRAND, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners and others were convicted of conspiracy to violate the Interstate Travel Act (18 U.S.C. 1952) by using the facilities of interstate commerce to commit bribery in violation of State law.[1] The evidence showed a scheme by the conspirators to arrange a kickback from petitioners if Mr. Marcus, Water Commissioner of New York City, awarded a large contract to S. T. Grand, Inc., for cleaning the Jerome Park Reservoir in the Bronx. The interstate use of the

[1] A co-defendant, Corallo, has also filed a petition for a writ of certiorari from the affirmance of his conviction below (No. 578, this Term), to which we have filed a separate response.

telephone, between New York and Connecticut, was an integral part of the conspiratorial scheme.

Petitioners contend at length that the evidence was insufficient to show that they had knowledge that interstate facilities would be used; that their constitutional rights as alleged targets of the grand jury investigation were infringed; that one Itkin, who testified against petitioners, did not participate in the conspiracy as an actual member thereof but rather as a government informer; and that there was error in the cross-examination of character witnesses. Petitioners' claims—the principal of which are essentially challenges to the factual findings of the jury and the courts below—are fully dealt with and answered in the extensive opinion of the court of appeals, on which we rely (see Pet. 34a–38a, 39a, n. 2, 44a–58a, 63a). In view of the detailed consideration given petitioners' contentions by the court below, we perceive no need either to repeat its analysis or attempt to elaborate further. There is no warrant for additional review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 578.

ANTONIO CORALLO,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY.

JACOB KOSSMAN,
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Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 578.

ANTONIO CORALLO,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY.

The Government's Memorandum in Opposition to the Petition for a Writ of Certiorari, though a mere two pages long, requires a response. The Memorandum has dark significance for what it contains and what it does not contain.

1. Despite the unwonted brevity of the Government's opposition in an important and complex case, the Government has mangled the facts concerning the status of its prime witness, Herbert Itkin, who maintains that he is an undercover agent for the F.B.I.

The Government asserts—erroneously—that the record shows that Itkin never reported anything about the conspiracy to the F.B.I. until after the last payment had been received and the matter was under investigation by the

State (Gov't Memorandum, p. 2). The record is flatly contrary. The evidence shows that the last payment was received in mid-May of 1967 (259a, 518a-520a). The State investigation began four months later in the Fall of 1967 (444a). Further, the Government's statement ignores the admitted fact that Itkin's work for the F.B.I. began in 1962 (802a). In 1963, the F.B.I. instructed Itkin to infiltrate organized crime as deeply as he could (552a). In May of 1967, the month of the last payment, Itkin informed the F.B.I., *inter alia,* that he had made contact with petitioner and co-defendant Motto (557a). During that month, he asked the F.B.I. to install recording equipment in his house so that he could record conversations that would serve as corroborative evidence of his reports (586a).

Moreover, the evidence indicates that the payment in mid-May of 1967, while the last one received, was not the last one expected by Water Commissioner Marcus and his co-conspirators. A claim for an additional $1600, never paid, lingered through the summer of 1967 into August (527a). Meanwhile, in June and July, Itkin was making more detailed reports to the F.B.I. (555a). The Government does not mention, of course, Itkin's highly plausible explanation for the timing of his reports of infiltration, based upon his assessment of the need to protect his "cover".

Thus, contrary to the assertions of the Government, Itkin was acting throughout on F.B.I. instructions, was reporting to the Government well before any State investigation and before the completion of the payments. Itkin has never varied from his testimony that he was at all times accumulating evidence to be turned over to the F.B.I. and viewed himself as working in his own way for the Government.

2. The Government reasserts its "position" in the Court of Appeals that Itkin was not an undercover agent because he had a personal stake in the venture (Gov't Memorandum, p. 2, n. 2). It is Governmental logic that, because Itkin took some of the kick-back money, he was not an undercover agent. Such reasoning is plainly a non-sequitur. Taking money did not erase Itkin's instructions from the F.B.I. or his overriding purpose of infiltration. He was not instructed to refuse to take his apparent share of the illegal funds, and it is a naive suggestion that he could have maintained his undercover status if he had done so.

The Government's actions—not their words—attest to their treatment of the status of Itkin as an undercover agent. Itkin has not been prosecuted for his "personal stake in the venture". While indicted to preserve his "cover", he was severed on Government motion and the charges are to be *nolle prossed* by the Government.

The Government Memorandum is conveniently silent on Itkin's still pending removal petition in the State case against him arising out of this basic transaction. In Federal court, Itkin asserts that he was a Federal officer in these events. The Government does not disavow his claim. See the Petition for Writ of Certiorari, pages 7-8.

3. The Government claims that the "factual issue" of Itkin's status "was resolved against petitioner both by the trial judge and by the court below on appeal." (Gov't Memorandum, p. 2). Unquestionably, the Court of Appeals made a wholly improper finding of fact on Itkin's status, as set forth in our Petition. Fact-finding is not an appellate court task. It is particularly egregious when, as here, the appellate court finds a "fact" by a wild misconstruction of the record as containing no evidence to the contrary. In the trial court, the judge made no findings of fact. The

Government now at last concedes at least that there is a "factual issue" concerning Itkin's status. Factual issues are tried to the jury. The refusal of the trial court to submit this factual issue under proper instructions to the jury is precisely the second question presented by this Petition.

4. The Government Memorandum's last footnote contends that, since Itkin himself testified, no hearsay objection could be made concerning his extra-judicial statements. The issues surrounding the Government subterfuge here go well beyond a mere hearsay evidence problem. Even so, the pretense that Itkin was a co-conspirator was the device used to introduce not only his own extra-judicial statements but also numerous harmful statements attributed to co-defendants Rappaport and Motto, who never took the witness stand and who could not be examined.

The Government's extremely brief Memorandum in Opposition, larded as it is with factual, logical and legal error, bespeaks the gross incongruity of the Government's position in this Court. They retreat to silence and misstatement. The obvious discomfiture of the Government is no basis for upholding this flawed conviction. Indeed, it underscores the vital need for this Court to exercise its power of review.

We respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

JACOB KOSSMAN,
Attorney for Petitioner.